Central Law Journal.

ST. LOUIS, MO., NOVEMBER 22, 1901

Our honored correspondent at Galveston, Mr. E. T. Harris, a prominent attorney of that city, has just sent us a marked copy of his brief in the case of Hildenbrandt v. Ames, now pending in the Court of Civil Appeals of Texas, First Supreme Judicial District. This case is one of many suits which will probably arise out of the late flood disaster at Galveston, in which that very difficult and unsettled question of law will prominently protrude itself,—the proof of survivorship in a common disaster. Perhaps that phase of the question arising under wills and the distribution of estates of decedents will occasion little difficulty, the law being quite well settled on that point. See the leading case of Newell v. Nichols, 75 N. Y. 78. That phase of the question, however, arising under policies of life insurance, is in hopeless confusion and considerably complicated by the further question of the vested interest of the beneficiary peculiar to regular life policies. Mr. Harris' brief canvasses this question, and in the marked copy to which we have alluded we observe that what he expressly considers his most valuable citation is from the CENTRAL LAW JOURNAL. In closing his discussion of the authorities Mr. Harris says: "The ablest article or *resume* of the law bearing upon the case at bar is found in the 53d CENTRAL LAW JOURNAL, pages 184-189, inclusive. Were it not for wearying this court we would embrace the entire language of said article in this argument, and submit it as the fairest presentation of both sides of the questions involved which has reached the eye of counsel for appellee. On page 189 of that article the author states, 'where the policy provides that the beneficiary shall take, "if surviving," no difficulty should arise in any view of the case, as, in such case, survivorship is clearly a condition precedent to the enjoyment of the fund, and upon the representatives of the beneficiary must be the burden of proving survivorship before they are entitled to take anything under the policy.' The article in question cites many cases, and we doubt not it will have the calm consideration of this Honorable Court." This is not the only instance in which this particular article has been cited. In a similar case pending in the Supreme Court of Missouri, the attorney for the administrator has sent us acknowledgment of its valuable assistance. We mention this simply as an evidence of the practical aid and assistance which the CENTRAL LAW JOURNAL renders the active practitioner in winning his cases. The JOURNAL is not a legal storybook nor a graveyard of obituaries. It is devoted solely to the law—the announcement of its latest principles, and the solution of its most difficult problems. It is for that reason more often cited in the decisions of the courts than any other law journal in the country. The great mass of digests and reports are, of course, invaluable to the lawyer in ordinary cases. But questions of extreme rarity or peculiarity, or which have been settled unsatisfactorily or contrary to right principles or on which there is great conflict of authority, must be determined by exhaustive and dispassionate analysis and not by the mere partisan citation of authorities, the mind of the court being more inclined toward the former than the latter. The CENTRAL LAW JOURNAL has a staff of paid contributors—practicing lawyers—of most exceptional competency who wrestle with these difficulties and boldly announce a solution based on the best considered authorities and the clearest principles of law. Such assistance is of all things most valuable to the court which seeks to be guided by right principle rather than solely by precedents, even if the latter are all "hog cases" and "on all fours."

No subject is more often litigated, apparently, than that of the liability of telegraph companies for negligent delivery of messages. The rule is that in all cases delivery must be made to the addressee or his authorized agent. The difficulty is not, however, in the rule itself as in its application. In the recent case of Western Union v. Hendricks, 63 S. W. Rep. 341, the Supreme Court of Texas held that where a telegraph message is addressed to a person residing in the country in care of a resident of the town, both of whom are temporarily in another town, and a special price is paid to secure

its delivery, the delivery to the partner of the latter is insufficient, but it should be delivered at the residence of the addressee. Other recent authorities on this question might be cited as follows: Pearsall v. Western Union, 124 N. Y. 256, 21 Am. St. Rep. 662; Telegraph Co. v. Mitchell, 91 Tex. 454, 44 S. W. Rep. 274, 66 Am. St. Rep. 906; Hendricks v. Western Union, 126 N. Car. 304, 35 S. E. Rep. 543; Western Union v. Mitchell (Tex. 1898), 44 S. W. Rep. 274; Western Union v. Jackson (Tex. App. 1898), 46 S. W. Rep. 279; Martin v. Telegraph Co., 18 Wash. 260, 51 Pac. Rep. 376. In the case of Western Union v. Tressall, 98 Ind. 566, however, it was held that there was an implied authority on the part of a hotel clerk to receive a telegram for a guest, and the company cannot be held responsible for the clerk in failing to deliver it. On the other hand, in the case of Western Union v. Jackson, 46 S. W. Rep. 279, it was held that though a telegram is directed in care of a certain person, the company must use diligence to deliver to the addressee. So also in the case of Telegraph Co. v. Mitchell, 91 Tex. 454, it was held that a charge that, in the absence of the husband, it was the duty of the company, if his wife was at the residence, to deliver to her a message addressed to him, was error, she not being the general agent of her husband.

NOTES OF IMPORTANT DECISIONS.

ACTION ON FOREIGN JUDGMENT—PROOF OF LAWS ALLOWING INTEREST ON JUDGMENTS IN FOREIGN STATE.—In the recent case of Schroeder v. Boyce, 86 N. W. Rep. 387, the Supreme Court of Michigan reversed the decision of a trial court because of failure to prove that a foreign state allowed interest on judgments. The appellate court held that where the trial court, in a suit on a judgment of another state, allowed interest thereon without proof of the rate of interest in such state, there was reversible error, since the common law was presumed to be in force in the foreign state, and at common law judgments do not carry interest. The court said: "There was no proof given in the case showing what the rate of interest is in the state of Indiana. As the common law is presumed to be in force in other states unless the contrary is shown, and at common law judgments do not carry interest, interest is not recoverable on a judgment rendered by the courts of another state without proof that the law of such state allows interest on judgments." Judgments at common law do not bear interest, so that in the absence of express legislation which, if of a foreign state, must be proved, a recovery on a judgment would not include interest. Hamer v. Kirkwood, 25 Miss. 95; Winch v. Ice Co., 86 N. Y. 618; *Ex parte* Brown, 18 S. Car. 87; Ormsby v. Johnson, 1 B. Mon. (Ky.) 80; Atchison, etc. R. R. v. Gabbert, 34 Kan. 132; Thompson v. Monrow, 2 Cal. 99, 56 Am. Dec. 318; Cavender v. Guild, 4 Cal. 253; Kermott v. Ayer, 11 Mich. 181.

CRIMINAL TRIAL—IMPROPER REMARKS OF TRIAL JUDGE.—Some courts seem to have fallen into the very bad practice of commenting on the evidence and insidiously infecting the jury with their own opinion of the facts in the case. As a general rule, however, these remarks do not call for a reversal of the cases unless it is clearly shown that appellant has been injured by them. Thus, in the recent case of Hinzar v. State, 63 S. W. Rep. 329, the Supreme Court of Texas held that a comment of the court in a criminal prosecution on rejected evidence that: "That cuts no ice. The only question is whether defendant assaulted her [the prosecutrix]."—while improper, is not reversible error.

While the court in this case may be correct in its view that such remark did not injure the appellant in this case, it is not difficult to imagine a case in which such a remark could be highly prejudicial. No comment could be more calculated to impress upon the jury the court's opinion that the evidence sought to be introduced was frivolous and in a close case would certainly affect the weight of the evidence and the verdict of the jury. It is the well-settled rule that any improper remarks of the court in the presence and hearing of the jury, liable to influence their action, is misconduct. Wanack v. Macon, 53 Ga. 163; Bowman v. State, 119 Neb. 523; Skelly v. Boland, 78 Ill. 438; Cronkhite v. Dickerson, 51 Mich. 177. Thus where in charging the jury the judge playfully remarked that the jury might give "such damages as would teach the old gentleman not to violate the Sabbath, nor injure his health by riding in the night, nor interfere with the rights of others," it was held that the instructions were erroneous, because the remarks were calculated to make the jury believe that the judge thought the facts justified heavy exemplary damages. Hair v. Little, 28 Ala. 236.

LIFE INSURANCE—MISREPRESENTATIONS AND WARRANTIES.—One of the most often litigated questions in the law of life insurance is the effect of misrepresentations in the application. The whole question lies wrapped up in the further question whether such representations are to be given the legal effect of warranties or of mere representations only. In the former case the statements in the application unless literally true will avoid the policy, however immaterial such misrepresentations may be; in the latter case mis-

statements in the application, sufficient to work an avoidance of the policy, must be of facts substantially material to the risk. In the recent case of Kansas Mutual Life Insurance Co. v. Pinson, 63 S. W. Rep. 531, the Supreme Court of Texas held that an application for life insurance recited that the applicant agreed that his statements to the medical examiner were true, and were offered to the company as a consideration of the contract. The policy stipulated that the insurance was granted in consideration of the statements and agreements in the application, "which are made a part of the contract." The applicant stated to the medical examiner that he had five sisters, aged, respectively, 52, 50, 47, 45, and 36 years, but their ages were in fact, respectively, 49, 46, 44, 36, and 33 years. The court held that the provisions of the policy constituted a warranty of the truth of the statements in the application, and that the discrepancy forfeited the contract. The court makes this peculiar statement of the law: "There is nothing in the facts stated in connection with the question which will take this case out of the general rule that the breach of a warranty in an insurance policy works a forfeiture of the contract. The rule that a substantial performance of a warranty is sufficient does not apply in this case, and we are not called upon to say what would be the effect if the variance between the actual ages and the ages warranted was very slight. Lest this opinion might be misunderstood, we will state that we do not intend to assert that a literal compliance with such a warranty would be necessary, but, in our opinion, the facts do not justify the court in assuming that the discrepancy in the ages is so irrelevant as to avoid the effect of the warranty. To the question, we answer that the provisions of the policy constitute a warranty of the truth of the statements made in the application, and that the discrepancy between the ages of the sisters as stated and their actual ages caused a forfeiture of the contract of insurance." The court's reference to a rule of law stating that a substantial performance of a warranty is sufficient, fails to find support from the authorities. The latter are all agreed that if the statements in the application, have by express agreement been made a part of the policy, and given the effect of warranties, they must be literally complied with. Hartford Insurance Co. v. Gray, 91 Ill. 159; Connecticut Mutual Life Insurance Co. v. Pyle, 44 Ohio St. 19; Alabama Insurance Co. v. Garner, 77 Ala. 210; Blooming Grove Insurance Co. v. McAnerney, 102 Pa. St. 335. It is only when the statements have simply the effect of representations and are not made a part of the contrac. that a substantial performance or accuracy will suffice. Horn v. Insurance Co., 64 Barb. (N. Y.) 81; Monlor v. Insurance Co., 101 U. S. 708; Lamb v. Insurance Co., 70 Iowa, 238.

VENUE IN FORECLOSURE SUITS.

The General Rule as to Venue in Chancery.—As the foreclosure proceeding, in the form we are here considering, is essentially a suit in chancery[1] the rules which govern its venue have their source in that forum. The prevailing doctrine is that all equity suits were once transitory.[2] Hence, chancery would entertain a bill for specific performance[3] or for redemption[4] where the defendant was served within the realm, though the suit involved land in a foreign jurisdiction. There are, indeed, decisions in which a contrary opinion is expressed,[5] but the above is the doctrine prevalent in England when the law as to venue originated, and is also the one most in harmony with the maxim that "equity acts *in personam*."

Strict Foreclosure a Transitory Proceeding.—The original foreclosure proceeding shared this characteristic of the other remedies of chancery, for it was a proceeding *in personam*.[6] But the proceeding of which this was true was not the modern foreclosure and sale; it

[1] Price v. State Bank, 14 Ark 50.

[2] Georgia: Clements v. Tillman, 79 Ga. 451, 11 Am. St. Rep. 441. Maryland: Carroll v. Lee, 3 G. & J. (Md.) 504, 22 Am. Rep. 350; Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448. Tennessee: Newman v. Stuart, Cooke, 339. Virginia: Dickinson v. Hoomes, 8 Gratt. (Va.) 410. Canada: "The foreclosure suit has come down from the chancery practice, and in that practice there never was any fixed locality of venue applying to certain actions as in the common law practice." Seymour v. De Marsh, 11 Ont. Prac. Rep. 472.

[3] Penn v. Lord Baltimore, 1 Ves. 444 (1750).

[4] Kanawha Coal Co. v. Kanawha, etc. Coal Co., 7 Blatchf. (U. S.) 415; *Cf.* Cholmondeley v. Lord Clinton, 2 Jac. & W. 134.

[5] Dunn v. McMillen, 1 Bibb (Ky.), 409, the court saying: "Analogous to this distinction at law between actions local and transitory, it has been held in chancery, that where the decree is to affect the land directly, as in the case of a suit brought for partition, or for dower, then the court cannot entertain jurisdiction only where the land lies." *Cf.* Parker v. McAllister, 14 Ind. 12; Gill v. Bradley, 21 Minn. 15; Collins v. Park (Ky.), 18 S. E. Rep. 1013; Chapin v. Circuit Judge (Mich.), 62 N. W. Rep. 351; Neal v. Reynolds, 38 Kan. 432.

[6] Federal Cases: Pennoyer v. Neff, 95 U. S. 714; Armdt v. Griggs, 134 U. S. 316, 326; Deck v. Whitman, 96 Fed. Rep. 873, 889. California: Fallon v. Butler, 21 Cal. 24, 33. Florida: Judge v. Forsyth, 11 Fla. 257, 262. Iowa: McConnell v. Hutchinson, 71 Iowa, 512, 516. But see Cole v. Conner, 10 Iowa, 299. Kentucky: Downing v. Palmater, 1 T. B. Mon. (Ky.) 164. Nebraska: Hurley v. Estes, 6 Neb. 386; Peters v. Dunnels, 5 Neb. 465. New Jersey: White v. Williams, 3 N. J. Eq. 376. New York: Kershaw v. Thompson, 4 Johns. Ch. (N. Y.) 609, 616. South Carolina: Trapier v. Waldo, 16 S. Car. 276, 283.

was the ancient remedy of strict foreclosure. This was in truth a suit *in personam*, because the relief obtained operated not to affect the land but to cut off the mortgagor's personal right or equity of redemption.[7] Now it was because of this fact that the proceeding was also transitory[8] and might be instituted in any place where the court had jurisdiction of the mortgagor's person.[9] The fact that the mortgaged land might be situated in another county[10] or state[11] or in a colony[12] or dependency,[13] having a different legal and judicial system, was wholly immaterial, so far as the *locus* of the suit was concerned. And conversely the fact that the land itself might be within the jurisdiction of the court would not authorize the court to entertain the bill if the parties could not be served there.[14] Such was the ancient law of venue in this proceeding, and such is still the rule where strict foreclosure alone is sought.[15]

Change Necessitated by Introduction of Equitable Foreclosure—Proceeding Becomes Either Local or Transitory.—With the introduction of the sale as a substitute for strict foreclosure came a necessary change in the law as to the venue of the suit. For in order to effect a sale the court must have jurisdiction of the *res;* title to land cannot be affected by a foreign tribunal, and hence a decree of foreclosure and sale in one state is without validity as to land in another.[16] Again, the mere fact that the land is within the jurisdiction enables a court to take cognizance of a bill praying for a sale.[17] Hence

[7] See Lansing v. Goelet, 9 Cow. (N. Y.) 346.

[8] "Originally it was regarded as transitory. In so far as it is local it is so made by statute." Ladd, J., in McDonald v. Second National Bank, 106 Iowa, 517-523.

[9] England: Toller v. Carteret, 2 Vern. 494 (1705); Paget v. Ede, 18 Eq. Cas. 118. Connecticut: Palmer v. Mead, 7 Conn. 149, 157; Broom v. Beers, 6 Conn. 198 In the latter case it is observed: "The plaintiff in error has taken several exceptions to the decree in question. The first is, that the suit was not brought in the proper county. The title of land is not in question; and such suits have always been considered transitory. 2 Swift's Dig. 197; How. Mort. 1043; Anon. 2 Chan. Cas 244; Owen v. Granger, cited. Arguendo, 2 Day, 477; Owen v. Hather, Superior Court, Hartford County, 1818; Stat. 34, tit. 6, cl. 1, sec. 6 (Ed. 1808)." Iowa: McDonald v. Second Nat. Bank, 106 Iowa, 517, 523. Kentucky: Caufman v. Sayre, 2 B. Mon. (Ky.) 202; Owings v. Beall, 3 Litt. (Ky.) 103. New York: House v. Lockwood, 40 Hun (N. Y.), 532; Union Trust Co. v. Olmstead, 62 N. Y. 729. South Carolina: Trapier v. Waldo, 16 S. Car. 276, 283. Tennessee: Grace v. Hunt, Cooke (Tenn.), 341; Avery v. Holland, 2 Overt (Tenn.), 71.

[10] Caufman v. Sayre, 2 B. Mon. (Ky.) 202; Owings v. Beall, 3 Litt (Ky.) 103; Broome v. Beers, 6 Conn. 198; Palmer v. Mead, 7 Conn. 157. *Cf.* Trapier v. Waldo, 16 S. Car. 276, 283.

[11] House v. Lockwood, 40 Hun (N. Y.), 532. This was a suit brought in New York for the strict foreclosure of a mortgage on land in Illinois. The court said: "The subject matter of this controversy is capable of being wholly and completely disposed of by a decree between those parties. They were personally within the jurisdiction of the court when its process was served upon them, and the defendants have appeared and served their answers contesting the right of the plaintiff to maintain the action. They are personally, therefore, subject to the jurisdiction of the court. And where that is the fact, and such jurisdiction has been acquired, there it has been the practice of courts of equity to decree relief, disposing of the controversy, although the subject matter itself may be situated in another state or county." See also Union Trust Co. v. Olmstead, 62 N. Y. 729.

[12] "Bills are often filed (in England) upon mortgages in the West Indies." Story, Equity Jurisprudence, sec. 1293. Thus Paget v. Ede, 18 Eq. Cas. 118, involved the foreclosure of a mortgage of an estate in Nevis, one of the Leeward islands.

[13] Teller v. Carteret, 2 Vern. 494 (1705). This was a suit to foreclose the defendant's equity of redemption in Sark, one of the Channel isles, the whole of which was subject to the mortgage. Neither the jurisdiction of the high court, nor the English mortgage laws extended to the island, but chancery entertained the bill by virtue of the service in England.

[14] Grace v. Hunt, Cooke (Tenn.), 341. *Cf.* Avery v. Holland. 2 Overt (Tenn.), 71; Owings v. Beall, 3 Litt. (Ky) 103.

[15] House v. Lockwood, 40 Hun (N. Y.), 532.

[16] England: Grey v. Manitoba & N. W. R. Co., App. Cas. (Privy Council, 1897) 254, 66 L. J. P. C. (N. S.) 66, where Lord Hobhouse observes: "As regards the question of sale, the decisions, both English and transatlantic, which bear on the jurisdiction of courts of justice to deal with foreign land, have been very carefully discussed in the courts below. It is hardly necessary to go into that discussion again here. The thing asked for by the bill is a judicial sale of land partly within and partly out of the jurisdiction, as an entire thing, and with specific directions by the court. It is impossible to do that." "The courts of our state will not recognize the right of courts in other states to affect directly the title to real estate in the former. The most that can be done is to allow foreign courts having jurisdiction of the parties to compel conveyances by the owner, and recognize as valid titles so acquired. We are aware of no case that has gone so far as to recognize the validity of a deed given by a referee or other officer of court by authority of law in another jurisdiction. The rule seems to be that the courts of each state have exclusive jurisdiction to settle the title to lands within its own limits." Farmers' Loan & Trust Co. v. Postal Tel. Co., 55 Conn. 324. Indiana: Eaton, etc. R. Co. v. Hunt, 20 Ind. 457, 465. Kansas: Lichty v. Martin, 11 Kan. 565; Union Trust Co. v. Olmstead, 62 N. Y. 729.

[17] "As a sale of mortgaged land operates *in rem*, cognizance over a bill for a sale may be exercised by the court of equity of the county in which the land lies, and would, upon common law principles, be restricted to that local court, if the prayer for a sale

arose the rule that a suit for both foreclosure and sale might be brought either in the county where the defendant resided or in that in which the land was situated.[18]

The Same Continued—Rule Made Statutory.—This doctrine which gave a dual venue to the foreclosure suit has been enacted into statutes in several of the states,[19] and in these the mortgagee may elect to institute proceedings in the county either of the mortgagor's residence or of the *situs* of the land. The same rule has been applied in the foreclosure of a vendor's lien[20] which has been treated as an equitable mortgage.[21] In Texas the district court of the county where the note, secured by the mortgage, is payable, has jurisdiction of the foreclosure suit,[22] and such was formerly the law in Iowa.[23] But where the mortgagor was not joined and the defendant, who was an assuming purchaser, resided in another county than that in which the land lay, it was held that the action could not be brought in the latter county,[24] and the same was decided where the mortgaged property included both real estate and chattels.[25] On the other hand, where the service was by publication only, the suit was required to be instituted in the county which was the *situs* of the mortgaged premises.[26] In Kentucky the statute making the venue local excepts decedents' mortgages, but this will not permit the institution of the suit in another county than that in which the land lies, unless there is also an administration suit pending there.[27]

The Same Continued—Venue made Local, but not Jurisdictional.—In some states the effect of legislation has been to render the foreclosure suit nominally local but also to permit the venue to be changed,[28] or the suit to proceed in another county than that of the *res*, unless such change is applied for.[29] Under statutes of this class the venue is not,

were the only grounds of jurisdiction." Caufman v. Sayre, 2 B. Mon. (Ky.) 202. *Cf.* Owings v. Beall, 3 Litt. (Ky) 103, 107.

[18] Caufman v. Sayre, 2 B. Mon. (Ky.) 202, the court saying: "A bill for ascertaining and settling the amount due, and for both foreclosure and sale, is personal as well as local; and, therefore, in our opinion, either the person of a necessary defendant or the locality of the mortgaged premises may give jurisdiction in such a suit. It cannot be known until the final decree, whether the suit may not produce the debt without a sale of the mortgaged estate."

[19] Alabama: Code, sec. 3421, construed in Reeves v. Brown, 103 Ala. 35 South. Rep. 824, where the court says: "When a bill is filed for the foreclosure of a mortgage on real estate, which is situated in one county, and the mortgagor resides in another, under section 3431 of the Code, the chancery court of either district or county,—the one where the mortgagor resides, or the one where the real estate or a material portion thereof is situated,—has jurisdiction, and the complainant may elect, at his pleasure in which of the two districts or counties he will file his bill. Ashurst v. Gibson, 57 Ala. 586; Harwell v. Lehman, 72 Ala. 345." Iowa: Cole v. Conner, 10 Iowa, 399; Finnagan v. Manchester, 12 Iowa, 521. The statutes has been changed since these cases were decided so that the action is now purely local. See *post*, p.
Tennessee: Code (1884), sec. 3515. This section permits the action to be brought in the county where the land lies, but it does not repeal the chancery rule which authorized the proceeding where the mortgagor could be found. Texas: Sayles' Civil Stat. vol. 1, sec. 1198, subdiv. 11; Kinney v. McLeod, 9 Tex. 78. It seems that in Texas foreclosure may also be brought in the county where the note is payable. Brigham v. Thompson, 12 Tex. Civ. App. 562, 34 S. W. Rep. 358.

[20] Joiner v. Perkins, 5 Tex. 300.

[21] See, however, Edminster v. Higgins, 6 Neb. 365, distinguishing this from an equitable mortgage.

[22] Brigham v. Thompson, 12 Tex. Civ. App. 562, 34 S. W. Rep. 358.

[23] Iowa, L. & T. Co. v. Day, 63 Iowa, 459; Equitable Life Ins. Co. v. Gleason, 56 Iowa, 47. *Cf.* Breckenridge v. Brown, 9 Iowa, 396. A statute authorizing the action to be brought where the note is payable governs though when the mortgage was executed the venue was local only; since the change does not substantially affect the rights of parties. Equitable Life Ins. Co. v. Gleason, 56 Iowa, 47.

[24] Higgins v. Frederick, 32 Tex. 283.

[25] Ashurst v. Gibson, 57 Ala. 584.

[26] Iowa L. & T. Co. v. Day, 63 Iowa, 459.

[27] Shield v. Yellman, 100 Ky. 655, the court saying: "It is manifest that if an action was pending to settle the estate of a deceased person, and mortgage liens were set up, the court, where the personal representative was qualified, alone having jurisdiction of such action, must also have jurisdiction to decree a sale of the mortgaged property, although it may be situated in another county. Hence the necessity for an exception to the general rule. In this case there was no personal representative and no suit to settle the estate. Moreover, it was a suit to sell the husband's interest as well as that of his wife's, and for his debt, and we do not see how in a suit in Fayette county his interest could have been sold, the action as to him being clearly local."

[28] Colorado: Fletcher v. Stowell, 17 Colo. 94, construing Colorado Code, secs. 25, 29. Missouri: Chouteau v. Allen, 70 Mo. 290, 354. New Hampshire: Tucker v. Lake (N. H.), 29 Atl. Rep. 406. New York: Code Civil Procedure, sec. 987.

[29] Colorado: Fletcher v. Stowell, 17 Colo. 94. New York: March v. Lowry, 26 Barb. (N. Y.) 197, 16 How. Pr. 41, construing Old New York Code, sec. 126. North Carolina: Falls of Neuse Mfg. Co. v. Brower, 105 N. Car. 440, construing Code, secs. 190 and 195. North Dakota: Code, sec. 5244. So in old Dakota territory. See Territory v. Judge, 5 Dak. 375. South Carolina: Trapier v. Waldo, 16 S. Car. 276, construing Code, sec. 149. Wisconsin: Pereles v. Albert, 12 Wis. 666. The foreclosure suit is now purely local in Wisconsin.

of course, jurisdictional.[30] Even though the proceeding be brought in another county than that specified in the statute the defect will be waived by the mortgagor's default,[31] or, in case he appear, by pleading to the merits,[32] or even by failing to ask for a transfer of the cause to the proper county,[33] and if such transfer is made the defect is likewise cured.[34] Some of the statutes, while providing for a local venue, employ language that s permissive only.[35]

Transfer of Cause to Another County.—Under a statute providing for a change of venue upon the application of the mortgagor, the fact that other points are involved than those relating to the land itself will not authorize a denial of the request;[36] and even where the venue is fixed and jurisdictional but the land lies in several counties, and it is shown that one of them would afford the most convenient place for the hearing, it is reversible error to refuse a change to such country.[37] It is likewise proper to grant a change of venue where it is shown by an undisputed affidavit that the judge to whom the application is made is a material witness for the applicant.[38] Under the former Iowa statute, which authorized the action to be brought either in the county where the land lay or in that where the note was payable, it was held that a suit in the latter county could not be transferred to the former unless the mortgagee should elect to proceed for a foreclosure only.[39] So the fact that a contract embodies a mortgage will not entitle the defendant in action on such contract, but not seeking foreclosure, to a transfer to the county where the mortgaged land is located.[40] The transfer of a foreclosure suit to another county is not authorized by a statute providing that special terms may be adjourned to the chambers of any justice of the district, and such transfer is erroneous though by a further adjournment the hearing finally takes place in the proper county.[41] While the denial of a change of venue is not always discretionary[42] the granting of an application therefore is, in some jurisdictions at least, not subject to review by an appellate court.[43] But the intention of the trial court to make

[30] Fletcher v. Stowell, 17 Colo. 94.

[31] Colorado: Fletcher v. Stowell, 17 Colo. 94. Dakota: Territory v. Judge, 5 Dak. 275. Iowa: McDonald v. Second Nat. Bank, 106 Iowa, 517.

[32] Chouteau v. Allen, 70 Mo. 290, the court saying: "After a court, which has general jurisdiction over a certain class of causes, proceeds without objection to the hearing and determination of a cause belonging to that class, it is quite too late in this court to raise objections to the irregular exercise of such jurisdiction; such objections, even if originally valid, lose their force when waived by pleading to the merits."

[33] Trapier v. Waldo, 16 S. Car. 276; March v. Lowry, 16 How. Pr. (N. Y.) 71; Pereles v. Alcert, 12 Wis. 666; Lane v. Burdick, 17 Wis. 92; O'Neil v. O'Neil, 54 Cal. 187; Gill v. Bradley, 21 Minn. 15; Beardsley v. Dickerson, 4 How. Pr. (N. Y.) 81.

[34] Tucker v. Lake (N. H.), 29 Atl. Rep. 406.

[35] Missouri: 2 Wagner's Stat. sec. 4, p. 1005, construed in Chouteau v. Allen, 70 Mo. 290, 354. Tennessee: Code (1884), sec. 3515. Texas: Sayles' Tex. Civ. Stat. sec. 1181, subdiv. 11.

[36] Falls of Neuse Mfg. Co. v. Brower, 105 N. Car., 440.

[37] Thompson v. Brandt, 98 Cal. 155.

[38] Spencer v. Iowa Mortg. Co. (Kan. App.), 50 Pac. Rep. 1094, the court saying: "The action was begun in Decatur county, and on application of the plaintiff a change of venue was granted to Thomas county, on the ground that the judge of the district court of Decatur county was a material witness on behalf of the plaintiff. This action of the court is the ground of the first assignment of error. It is contended that the showing made therefor was not sufficient to sustain the order. This contention cannot be sustained. The showing made for the change of venue was much stronger than in the case of Gray v. Crockett, 35 Kan. 66, 10 Pac. Rep. 452, relied on by counsel for plaintiff in error, and the order changing the venue was sustained by the supreme court in that case. That affidavit did disclose the facts that the plaintiff expected to prove by the district judge; and, while it is true that the examination of the judge as a witness did disclose that he was not possessed of knowledge of all of the facts set forth in the application for the change, yet he did testify to some facts material to the plaintiff in the trial of the case."

[39] "It will be observed that the note was payable, and therefore suable, in Linn county, whilst a suit for the foreclosure of the mortgage, might, at least, be brought in Jones. Passing the questions upon the petition, as to whether it is in law or equity, and the two causes of action set forth, with a reference to the case of Kramer v. Rebman, *ante*, 114, we think there was no error in overruling the motion for a change of venue. Both causes of action did not belong to Jones county any more than to Linn, even admitting that the second belonged to Jones. The motion should have been that the plaintiff elect upon which to proceed, and if she elected the bill to foreclose a motion for a change would have been proper. The court could not send both to Jones." Breckinridge v. Brown, 9 Iowa, 396.

[40] Max v. Harris (N. Car.), 34 S. E. Rep. 437.

[41] Gould v. Bennett, 59 N. Y. 324.

[42] Thompson v. Brandt, 98 Cal. 155; Falls of Neuse Mfg. Co. v. Brower, 105 N. Car. 440.

[43] Tucker v. Lake (N. H.), 29 Atl. Rep. 406, the court says: "Whether justice required the order to be made was a question of fact that was decided affirmatively at the trial term, and the decision is not reviewable here. Hazen v. Quinby, 61 N. H. 76; Garvin v. Legery, 61 N. H. 153; Gagnon v. Connor, 64 N. H. 276, 9 Atl. Rep. 631; Holman v. Manning, 65 N. H. 92, 18 Atl. Rep. 746."

such an order will not be inferred from mere terms of the order of reference to one who resides in another county.[44]

Venue made Local and Jurisdictional.—The tendency of legislation in the United States has been steadily towards restricting the venue of the foreclosure suit to the county which forms the *situs* of the mortgaged land, and such is now the law in a majority of our jurisdictions,[45] and the rule has been so extended as to include the foreclosure of a vendor's lien[46] and a land contract;[47] indeed, so complete has been the change from its original character in this regard that a New York judge, losing sight apparently of its history, declared of the foreclosure action as early as 1855 that "it is in its nature local."[48] As we have already seen,[49] such was not its nature once, and so far as this is now the case it has become so by statutes,[50] which generally specify the county where the mortgaged property or "a part thereof" is located, as the only proper place for bringing the suit.[51]

The Same Continued.—The result of such enactments has been to render the venue of foreclosure not only local but jurisdictional.[52] The pendency of the suit in any other county than that in which the land lies is forbidden,[53] and the courts of such other county are without jurisdiction to render a decree therein,[54] or even to order a purchaser at the sale in the proper county to show cause why he has failed to comply with his bid.[55] Usually an exception is made where the property is located in different counties but this will be discussed in a subsequent section.[56] The objection that the venue is laid in the wrong county is available by way of a motion to dismiss or demurrer,[57] since it should appear on the face of the bill;[58] when not so appearing, however, it may, under the chancery practice, be raised by a plea in abatement[59] and in the Georgia system of foreclosure by rule *nisi* the objection is not too late when first urged at the trial.[60]

Venue of Suit Involving Mortgages in More Than One County.—It has already been shown[61] that the statutes making the foreclosure suit local frequently require it to be brought in the county where the mortgaged land, "or a part thereof," is located. This alternative clause is intended to govern cases where the property is situated in different counties, and as to such the venue may usually be laid in any of them. The same rule has been applied in the foreclosure of deeds intended as a mortgage and relating to parcels of land in more than one county.[62] A bill showing such diverse location does not on its face disclose want of jurisdiction though it fail to distinguish between the parts of lands in the respective counties,[63] nor is it material that not all of the defendants are residents of the county where the suit is pending.[64] In California not only the hearing but the

[44] Wheeler v. Maitland, 12 How. Prac. (N. Y.) 35.

[45] So also in Ontario. See Rules of Practice, 529; Hunter on Foreclosure (1899), p. 17, changing the doctrine of Seymour v. DeMarsh, 11 Ont. Pr. Rep. 472.

[46] Southern Pac. R. Co. v. Pixley, 103 Cal. 118.

[47] Fraley v. March, 68 N. Car. 160.

[48] Wheeler v. Maitland, 12 How. Pr. (N. Y.) 35, *per* Peabody, J.

[49] See *ante*, paragraph first of this article.

[50] McDonald v. Second Nat. Bank, 106 Iowa, 517, 523.

[51] See Wagener v. Swygert, 30 S. Car. 296, 302; Falls of Neuse Mfg. Co. v. Brower, 105 N. Car. 440; cases cited in note 1 *supra*.

[52] California: Rogers v. Cady, 104 Cal. 288; Fritts v. Camp, 94 Cal. 393; Campbell v. West, 86 Cal. 197. The early case of Vallejo v. Randall, 5 Cal. 461, to the same effect was overruled in Watts v. White, 13 Cal. 321, which latter was decided, however, before the adoption of the constitutional clause requiring the suit to be brought at the *situs* of the land. Iowa: See Chadbourne v. Gilman, 29 Iowa 181. But *Cf. contra*, McDonald v. Second Nat. Bank, 106 Iowa, 517. New York: Gould v. Bennett, 59 N. Y. 124. South Carolina: Kaminisky v. Trantham, 45 S. Car. 8, 22 S. E. Rep. 746. Wisconsin: Beach v. Summer, 20 Wis. 274.

[53] "This language is too clear and precise to admit of any doubt as to the intention of the legislature. That intention indubitable was, to prohibit the bringing of an action to foreclose a mortgage in any county other than the one where the mortgaged property, or some portion of it, was situated." Beach v. Sumner, 20 Wis. 274.

[54] Rogers v. Cady, 104 Cal. 288.

[55] Kaminisky v. Trantham, 45 S. Car. 8, 22 S.E. Rep 746. This conclusion was reached notwithstanding a statute which authorized foreclosure action to be heard and determined in chambers and process to be issued therein.

[56] See next section.

[57] Hartwell v. Lehman, 72 Ala. 344.

[58] "It was necessary to give the court jurisdiction to enter this decree of foreclosure, that the plaintiff should prove that the land was situated in the county of Orange; and, in the absence of an allegation of the fact in his complaint he was not entitled to prove it. Campbell v. West, 86 Cal. 197."

[59] Harwell v. Lehman, 72 Ala. 344.

[60] Hackenhill v. Westbrook, 53 Ga. 285.

[61] See *ante*.

[62] Lomax v. Smyth, 50 Iowa, 223.

[63] Bolling v. Munchus, 65 Ala. 558.

[64] Wagener v. Swygert, 30 S. Car. 296; Hendrix v. Nesbitt, 96 Ky. 652.

sale and issuance of the sheriff's deed may take place in one of the several counties containing the land,[65] though it clearly appears that another county would afford the witnesses a more convenient place of trial it is error to refuse a transfer of the cause to such county.[66] In Nova Scotia, also, the sheriff of either of two counties containing adjacent mortgaged lands may conduct the sale and execute the deed,[67] but under the Indiana statute, naming the door of the county court house as the place of sale, the lands in the other counties cannot be sold though included in the decree.[68]

The Same Continued.—Mortgage Must be Single, but Lands Need not be Adjacent.—The general rule above discussed applies where there is but one mortgage, though the property subject thereto is located in several counties. The rule is inapplicable, however, where the tract in each county is subject to a separate mortgage.[69] The court may be without jurisdiction to foreclose all such mortgages in a single suit[70] and the attempt to do so constitutes at least a misjoinder and the defendant may have all the matter relating to mortgages outside the county stricken from the pleadings.[71] But if there is only one mortgage the tracts covered by it need not usually be contiguous,[72] though by statute in Nova Scotia the rule appears to be different.[73] Again, the equitable mortgage created by several deeds of tracts in as many counties may be foreclosed in any one of them if there is but a single instrument containing the defeasance clause and relating to all of the deeds.[74]

Mortgages of Railway and Similar Property.—The doctrine that a decree of equitable foreclosure and sale is inoperative beyond the territorial boundaries of the jurisdiction wherein the court sits finds an exception in the case of mortgages on interstate railways and bridges. The exception is based on public policy and considerations derived from the argument *ab inconveniente*,[75] and while there is some early authority to the contrary[76] it is now the prevailing American rule that a mortgage of a line of railway constructed through two or more states may generally be foreclosed in a court where a jurisdiction is limited to one of them[77] and a sale of the entire line decreed.[78] So a federal circuit court has jurisdiction of a suit to foreclose a mortgage of a bridge connecting with a foreign country[79] or state[80] the state where the court sits. In order to avoid compli-

[65] Goldtree v. McAlister, 86 Cal. 93.

[66] Thompson v. Brandt, 98 Cal. 156.

[67] Revised Stats. of Nova Scotia (5th Ser. 1884) ch. 123, § 12.

[68] Holmes v. Taylor, 48 Ind. 169.

[69] McDonald v. Second Nat. Bank, 106 Iowa, 517; Chadbourne v. Gilman, 29 Iowa, 181.

[70] Chadbourne v. Gilman, 29 Iowa, 181.

[71] McDonald v. Second Nat. Bank, 106 Iowa, 517.

[72] "In the argument it is admitted that a district court under this statute might in one suit decree a sale of land situated partly in two counties, if the premises be in compact form, as a single 40 acre tract, or any number of legal subdivisions adjoining each other, but not if the lands in different counties are separate tracts. By this rule of construction a mortgage upon a strip of land like the right of way of the Northern Pacific Railroad, for instance, extending across the entire territory, and embracing land in twelve counties, might be subject to sale under a decree in a single suit brought in either of the counties; and the court authorized to render such a decree would be without jurisdiction to order a sale under a mortgage of a single acre situated in an adjoining county, unless the acre touched other land covered by the same mortgage in the county wherein the court was held. The authorities cited do not require me to recognize any such distinction." Hamford, J., in Stevens v. Ferry, 48 Fed. Rep. 7. *Cf.* Prospect Bldg. etc. Assn. v. Russell, W. N. Cas. (Pa.) 360."

[73] Rev. Stats. of Nova Scotia (5th Ser. 1884), ch. 123, § 12.

[74] Lomax v. Smyth, 50 Iowa, 223. See this case explained in McDonald v. Second Nat. Bank, 106 Iowa, 517.

[75] Muller v. Don, 94 U. S. 444.

[76] Eaton, etc. R. Co. v. Hunt, 20 Ind. 457.

[77] *Federal Cases:* Muller v. Dow, 94 U. S. 444; Central Trust Co. v. Wabash, etc. R. Co., 29 Fed. Rep. 618. Illinois: Craft v. Indiana, etc. R. Co., 166 Ill. 580. Pennsylvania: McElrath v. Pittsburg, etc. R. Co., 55 Pa. St. 189, the court saying: "The plaintiff excepts to the report of the master, on the ground that he ommitted to incorporate into the form of a decree submitted by him a provision ordering the trustee in the mortgage to sell the estate and title of the Steubenville Railroad Company in that portion of the railroad situate in the state of West Virginia. Without deciding what estate would pass by the trustee's sale under the mortgage, we are of the opinion that we can, by our decree operating upon the trustee himself, authorize and compel him to sell and convey whatever interest of the railroad company will pass under the terms of the mortgage."

[78] Craft v. Indiana, etc. R. Co., 166 Ill. 580.

[79] International Bridge & Tramway Co. v. Holland Trust Co., 81 Fed. Rep. 422. *Cf.* Muller v. Dow, 94 U. S. 444.

[80] "Multitudes of bridges span navigable streams in the United States,—streams that are boundaries of two states. These bridges are often mortgaged. Can it be that they cannot be sold as entireties by the decree of a court which has jurisdiction of the mortgagors?" Strong, J., in Muller v. Dow, 94 U. S. 444.

cations of title, ancillary proceedings are often instituted in the other jurisdictions to which the line extends,[81] but the bill filed in such a proceeding must be sufficient in itself to constitute a basis for the decree therein, and it is not enough to refer to or incorporate a copy of the bill in the main suit.[82] A decree of foreclosure in one state cannot, however, make valid a mortgage on the entire line which fails to conform to the laws of another state through which the line runs.[83] In Canada the courts of one province are without power to decree the sale, as a whole, of a section of railway partly in another province.[84]

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[81] Central Trust Co v. Wabash, etc. R. Co., 29 Fed. Rep. 618; Central Trust Co. v. East Tennessee, etc. R. Co., 60 Fed. Rep. 895; Farmers' Loan & Trust Co. v. Chicago, etc. R. Co., 27 Fed. Rep. 148.

[82] Mercantile Trust Co. v. Kanawha, etc. R. Co., 39 Fed. Rep. 337.

[83] Pittsburgh & State Line R. Co.'s Appeal, 1 Pa. Sup. Ct. Digest (1886), 146, 4 Atl. Rep. 385.

[84] Grey v. Manitoba & N. W. R. Co., App. Cas. (1897) Privy Council, 254, 66 L. J. P. C. (N. S.) 66.

NATIONAL BANKS—PENALTY FOR TAKING USURY—ACCRUAL OF CAUSE OF ACTION.

CITIZENS' NATIONAL BANK OF DANVILLE v. FORMAN'S ASSIGNEE.

Court of Appeals of Kentucky, July 7, 1901.

1. The discounting by a national bank of a note at a usurious rate of interest is merely the "charging" or "reserving" of usury, and not the "taking" or "receiving" of usury; and the debtor's right of action under Rev. St. U. S. § 5198, to recover twice the amount of usurious interest paid, does not accrue when the note is discounted.

2. Where a national bank contracts for interest at a usurious rate, it at once forfeits all interest, and unappropriated payments subsequently made by the debtor must be first applied to the principal, so that while any part of the principal remains unpaid there is no payment of usurious interest, and no right to recover the penalty for taking usury accrues, unless payments made by the debtor are specifically applied by him to usurious interest.

DU RELLE J.: This was an action brought by appellee, as assignee for the benefit of the creditors of W. M. Forman, under section 5198 of the Revised Statutes of the United States, to recover of appellant bank double the amount of certain payments claimed to have been made of usurious interest by Forman to the bank upon a loan by the bank to Forman of $3,117.84 on January 29, 1895.

It appears that on January 29, 1895, Forman executed his note for $3.250, payable to the order of J. M. Farris six months after date, and negotiable and payable at appellant bank. Farris was the president of the bank, and in this manner was acting for the bank, using the bank's money. He indorsed the note to the bank, and $3,117.84 was placed to his credit, for which sum Farris gave Forman his check, and that amount was placed to Forman's credit. Considerable argument is devoted by appellant to the question of whether the note was discounted at the bank. It may be conceded that it was. We are unable to see that the question whether the note was discounted cuts any particular figure in determining the questions involved.

The Revised Statutes of the United States provide:

"Sec. 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the state, territory, or district where the bank is located, and no more, except that where, by the laws of any state, a different rate is limited for banks of issue organized under state laws, the rate so limited shall be allowed for associations organized or existing in any such state under this title. When no rate is fixed by the laws of the state or territory or district, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt is to run. * * *

"Sec. 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case a greater rate of interest has been paid the person by whom it has been paid or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of interest thus paid from the association, taking or receiving the same, provided such action is commenced within two years from the time the usurious transaction occurred. * * *"

The first question is whether the discounting of the note, and the deduction from its face of 8 per cent. for six months, was a payment by Forman on January 29, 1895, of that amount of interest to the bank. On behalf of the bank it is earnestly insisted that it was a payment. As matter of course, there was no physical payment of money by Forman to the bank. What he did was to execute and deliver his note for $3,250 to the order of Farris, and to receive or have placed to his credit the sum of $3,117.84. If this constitutes an actual payment by him of interest, as such, at 8 per cent., in advance, he was entitled to bring suit the next day for twice the amount of interest thus paid, and consequently his right of action was barred when he brought the suit on September 3, 1897. On the other hand, if, as contended

by appellee, the transaction was a loan of $3,117.-84, for which a note was then executed for $3.250, it follows that interest at 8 per cent. was carried in the note at least until September 4, 1895, when, according to the bank's calculation, the amount of the note was $3.273.85, $23.85 of which was interest on the $3.250 at 8 per cent. from August 1st to September 4th. Under the statute, we are unable to conclude that the original transaction was a payment of interest to the bank, or a payment at all. Upon the bank books it is treated as a loan of $3,250, or a discount of a $3.250 note, upon which the books show a profit placed to the credit of the discount account of $132.16. The statute makes no distinction between a reservation of interest by way of discount and the accomplishment of the same thing by any other mode. The bank could not lawfully reserve a greater rate by way of discount deducted in advance than it could as interest at the end of the loan period. And when we consider the distinction recognized by the statute between reserving and charging interest, on the one side, and actually paying interest, on the other, it becomes plain that there was in the initial transaction no actual payment of interest to the bank; for there was then no payment to the bank of anything. Interest was reserved and charged on the loan, or "discount," in the language of the statute. but was not "taken or received." Nor does this construction conflict with that part of the statute which authorizes interest to "be taken in advance, reckoning the days for which the note, bill or other evidence of debt is to run." That language would apply to a case where, upon a renewal of a note for the face of an existing debt, the debtor paid in cash or by check, in advance, the amount of the discount upon the renewal. What was done in the original transaction was this: Forman gave the bank his note for $3,250, and that was all he gave the bank. He received from the bank $3,117.84, and he kept it all. Harvey v. Insurance Co., 60 Vt. 209, 14 Atl. Rep. 7. Moreover, to hold that discounting a note for $3,250, and giving credit to the maker for $3,117.-84, was an actual payment to the bank of $132.16, would give the maker or his assignee the right immediately to bring an action for twice the amount of the usurious interest, when in fact nothing had been paid to the bank at all. And until the interest at the usurious rate was actually paid, as such, the bank had the right to elect to remit it, and it could not then be said that usurious interest was paid on it. Brown v. Bank, 169 U. S. 420, 18 Sup. Ct. Rep. 390, 42 L. Ed. 801; McBroom v. Investment Co., 153 U. S. 328, 14 Sup. Rep. Ct. 852, 38 L. Ed. 729; Stevens v. Lincoln, 7 Metc. (Mass.) 528; Saunders v. Lambert, 7 Gray, 486; Stedman Bland, 26 N. Car. 299. The law will not construe that to be a payment of illegal interest which is not in fact such payment, in order to subject the lender to the penalty denounced for the illegal receiving of interest, when he is guilty of an illegal bargain only, and has subjected himself only to the forfeiture imposed by law for that violation.

There was no payment of interest on January 29, 1895. On September 4, 1895, the bank claimed there was due it $3,273.85; being the face of the note, with interest thereon from maturity at 8 per cent. Forman on that day paid the bank $800. We may assume it was intended as a payment on the note. The bank credited it to his account. He executed a new note for $2.500, which was discounted, and the proceeds, $2.431.-66, placed to the credit of his account; and the amount of the original note, according to the bank's calculation, was charged to his account. Was this a payment of interest upon Forman's debt? Clearly, it was not specifically so appropriated by him. It seems equally clear that no part of it was appropriated by the bank, specifically, to the payment of interest at the usurious rate. For appellee it is claimed that it was appropriated, or must by the law be appropriated first to the extinguishment of the interest on the note, at the 8 per cent. rate, and was then a payment of interest at an illegal rate, from which a right of action then accrued for twice the amount of the interest thus paid, which was not barred by the two-years limitation provided in section 5198, Rev. St. U. S., when this suit was brought one day less than two years thereafter. For the bank it is insisted that if the interest was not paid in advance, as claimed by it, it has never been paid, and that as the petition does not allege that the final renewal note has ever been paid in full, but, in so far as it shows anything, shows there was still a large amount unpaid, at the time this suit was brought, the whole interest must be considered as still carried in the note,—so far, at least, as the $800 payment is concerned. This statute forbids the taking, receiving, or charging a rate of interest greater than that allowed by section 5197. When the statute is knowingly violated, the violation is deemed a forfeiture of the entire interest which the obligation carries with it, or which has been agreed to be paid thereon. In case a greater rate has been actually paid, the person by whom it has been paid may recover a penalty of double the amount of interest so paid. The construction which the language of the section naturally bears, and which has been given it by the supreme court and numerous other courts, is that it provides for two contingencies: First, when the usurious rate is reserved or charged, the whole agreement to pay any interest is void; second, if the usurious rate is actually paid, double the amount so paid may be recovered within two years by the debtor. Said Mr. Justice Harlan in the case of Brown v. Bank, *supra:* "The last section [5198] clearly makes a difference between interest which a note, bill, or other evidence of debt held by a national bank 'carries with it or which has been agreed to be paid thereon,' and interest which has been 'paid.' Interest included in a renewal note or evidenced by a separate note

does not thereby cease to be interest, within the meaning of section 5198, and become principal. If a bank which violates that section sues upon the note, bill, or other evidence of debt held by it, the debtor may insist that the entire interest, legal and usurious, included in his written obligation, and agreed to be paid, but which has not been actually paid, shall be either credited on the note or eliminated from it, and judgment given only for the original principal debt, with interest at the legal rate from the commencement of the suit." And again: "The forfeiture declared by the statute is not waived or avoided by giving a separate note for the interest, or by giving a renewal note in which is included the usurious interest. No matter how many renewals may have been made, if the bank has charged a greater rate of interest than the laws allows, it must, if the forfeiture clause of the statute be relied on, and the matter is thus brought to the attention of court, lose the entire interest which the note carries or which has been agreed to be paid. By no other construction of the statute can effect be given to the clause forfeiting the entire interest which the note, bill, or other evidence of debt carries, or which was agreed to be paid, but which has not been actually paid. * * * Sometimes interest is said to have been paid when it is evident that it was only included in a renewal note. But that, as we have said, was not payment, within the meaning of the statute."

There being no appropriation of any part of this payment by the debtor to the payment of interest, as such, the law will not presume an application of it to an illegal and void obligation; nor will it permit the creditor to make such an application. So the principle of law which applies such unappropriated payments to first discharge the interest due, and then reduce the principal, cannot operate in this case; for all interest upon the note was forfeited, *eo instanti*, by the agreement to pay interest at the illegal rate, and payments will not be applied by operation of law to the discharge of unlawful obligations in preference to debts justly due. The great weight of authority, including the rulings of the supreme court, is to this effect, and this is in full accord with the rulings in this state upon similar transactions where other than national banks are concerned. Unapplied payments are applied first to the extinguishment of interest, and then to reduce the principal. If a part of the interest is usurious, but, although it was contracted for at an illegal rate, legal interest is still recoverable, the payment is applied first to the extinguishment of so much of the interest as is legal, and then to the principal; the usury being retained in the debt to the last, no matter how many renewals are made. Kendall v. Crouch, 88 Ky. 202, 11 S. W. Rep. 587; Smith v. Robinson, 10 Allen, 132; Hawkins v. Welch, 8 Mo. 492; Hall v. Bank, 30 Neb. 102, 46 N. W. Rep. 150; Jackson v. Garner, 79 Ga. 415, 7 S. E. Rep. 213. So where, as in this case, the nature of the contract is such that the collection of all interest is prohibited, because contracted for at an illegal rate, a payment without direction by the payor as to its application must be applied first to the payment of that part of the debt which is legal, and to the illegal part only in the event of there being nothing else to which it can be applied. In the supreme court decisions it seems to be recognized that usurious interest may be paid, as such, without the discharge of the entire obligation, including principal and interest, and that, if so paid, a cause of action will then arise for the penalty imposed for the actual taking of interest at the illegal rate. For example, in the Marion National Bank Case, *supra*, it is said: "If at any time the obligee actually pays usurious interest, as such, the usurious transaction must be held to have then, and not before, occurred, and he must sue within two years thereafter."

Upon the proposition that, in the absence of a specific application by the debtor, the law will not apply, and the creditor has no right to apply, payments to an unlawful purpose to the discharge of usurious interest, which was forfeited by the statute the instant it was agreed on, the authorities are numerous. In McBroom v. Investment Co., 153 U. S. 328, 14 Sup. Ct. Rep. 852, 38 L. Ed. 321, the question arose under the statute of New Mexico, by which the collection of interest at a higher rate than 12 per cent. was made a misdemeanor, and a right of action given to the debtor to collect double the amount so paid within three years after the cause of action accrued. Interest notes were given upon a loan of $65,000, and a commission of 10 per cent. upon the entire loan was paid to the creditor at the time of the transaction. After the first interest note was paid, the debtor brought suit to recover double the amount of the commission. In this case it will be observed that the statute does not make the contract for the entire interest void, but that the contract for the excessive interest is rendered void by the contract for a higher rate being made a misdemeanor. Said the supreme court: "The contract of loan not being void, except as to the excess of interest stipulated to be paid, the question arises whether the lender is liable to an action for the penalty prescribed by the statute, so long as the principal debt, with legal interest thereon, after deducting all payments, is unpaid. We are of opinion that this question must be answered in the negative. While, under the statute, the mere charging of usurious interest may be a misdemeanor for which the lender can be fined, whether such usurious interest is or is not collected or received, the borrower has no cause of action until usurious interest has been actually collected or received from him. Such is the mandate of the statute. And interest cannot be said to have been collected or received, in excess of what may lawfully be collected and received, until the lender has in fact, after giving credit for all payments, collected or received more than

the sum loaned, with legal interest." In Duncan v. Bank, Fed. Cas. No. 4135, in the district court of the United States for the western district of Pennsylvania, it was said: "From the origin of the loan,—from the retaining of the first discount through all the renewals up to the time of final payment of the principal or up to the time of entering judgment. — there is a *locus penitentiæ* for the party taking excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. * * * Up to that time he may take this election. When payment is actually made or judgment entered, the election is made; and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete." Thomp. Nat. Bank Cas. 360, 362. In Stevens v. Lincoln, 7 Metc. (Mass.) 528, the court said, "* * * that while the usurious interest is unpaid there remains the *locus penitentiæ;* that the party may relinquish it, and recover for the balance of his debt, the contract not being rendered void by the statute. And, in the absence of proof as to any appropriation of any partial payment, the law will apply a payment to the valid demand rather than to the illegal one; and the balance which remains unpaid, if it exceeds the usury agreed to be paid, includes the usury; so that, on one side, the debtor shall not recover back any part of that which he honestly owed, by the allegation on his part that the payment made by him was the payment of the usury; nor, on the other hand, will the law permit the creditor to secure to himself the avails of his illegal contract, and, when he sues for the balance due on the contract, to aver that the usurious interest was contained in the previous payment, and that the residue is justly due." See, also, Saunders v. Lambert, 7 Gray, 486. So, in Harvey v. Insurance Co., 60 Vt. 211, 14 Atl. Rep. 7, it was said: "All the payments made by her, as well as those made by the plaintiff, up to the final payment, were, in law, to be applied towards the liquidation of the legal portion of the note." And in Wright v. Laing, 3 Barn. & C. 169, an action to recover penalties for usury, the court said: "If the law ought now to make such an appropriation as the pleader has supposed in this court, the count will be sustained by the proof, otherwise not. We think the law ought now to make such an appropriation. * * * And such an appropriation works no prejudice to the party. It leaves him only where by his own conduct he placed himself. And in the case I have put, of the payment of one bill and non-payment of the other, if an action for the penalties of the statute should be brought, the same principle of law would protect the defendant, by applying the payment of the first bill to the legal demand, and not permitting the then plaintiff to apply it to the illegal demand,—that is, to the loan and interest, although it be precisely of the same amount,—because, peradventure, the lender might repent the illegal bargain, and refuse to receive the full amount of the second bill, and the law will allow him the opportunity of doing so, that he might not be deemed a receiver of usurious interest, without clear evidence that he had not only bargained to receive, but had actually received, such interest. And if the law will make this appropriation of the payment in the two cases that I have put,—in the one instance against the lender, and to prevent him from enforcing an illegal bargain, and in the other instance in favor of the lender, and to protect him from being subject to a penalty for an illegal bargain only,—it seems very plainly to follow that a similar appropriation ought to be made by law in the case before the court. * * * And this, in effect, is only saying that where a person has two demands, one recognized by law, the other arising on a matter forbidden by law, and an unappropriated payment is made to him, the law will afterwards appropriate it to the demand which it acknowledges, and not to the demand which it prohibits." It has been frequently held that: "Payments may be applied by a creditor to demands not recoverable at law, when no statute prohibits the contract, but simply denies a remedy to enforce them. In such cases the contract is not illegal, and the money, if voluntarily paid, cannot be recovered back. But the right does not extend to contracts which are 'prohibited by law, under heavy penal forfeitures and payments, which may at once be recovered back, because illegal.' So held where a payment had been applied to a grossly-usurious contract, which could have been enforced, and the law gave the debtor a right to recover back three times the amount paid for usurious interest." Marye v. Strouse, 6 Sawy. 204, 5 Fed. Rep. 493, citing Rohan v. Hanson, 11 Cush. 44. In Stout v. Bank, 69 Tex. 384, 8 S. W. Rep. 808, it was held that when partial payment is made to a national bank under a contract to pay usurious interest in the absence of a stipulation as to how the payment shall be appropriated the law will apply it to that part of the contract which is legal. And in Stanley v. Westrop, 16 Tex. 206, it was held that "the law will not make the application, nor authorize the creditor to make it, without the consent of the debtor to the payment of usury." And see Burrows v. Prettyman, 17 Iowa, 436. In Bank v. Slemmons, 34 Ohio St. 142, 32 Am. Rep. 366, it was said: "Where interest at a rate exceeding that allowed by law is retained or stipulated for, the contract is, under the laws of the state, invalid only as to the excess, while under the thirtieth section of the national banking act 'the statute operates on the instrument given for the loan, and, in effect, declares it to be invalid as to the entire interest, but valid and binding as an obligation for the payment of the principal.' Bank v. Garlinghouse, 22 Ohio St. 492, 502, 10 Am. Rep. 751; Shunk v. Bank, 22 Ohio St. 508, 10 Am. Rep. 762;

Hade v. McVay, 31 Ohio St. 231." The conclusion we have reached is in full accord with the reasoning of the opinion by Judge Paynter in Bank v. Thompson (Ky.), 40 S. W. Rep. 903. It is true that in that case the interest was on several occasions added in the renewal notes, but the court found as a fact that the interest was subsequently actually paid. It was said by the court that "it appears that the interest thus added in the note was paid at dates subsequent to the time the interest was added in the note. At one time $620 was paid. At another time a note for $316.25 was given for the interest which had been embraced in the note."

A careful examination of the evidence in this case shows that none of the payments were appropriated by the debtor to the discharge of the interest. It follows, therefore, that the trial court erred in adjudging a recovery of double the amount claimed by the bank to be due at the time of such payments. The note was not discharged at the date when this suit was brought, and no payment of interest at the usurious rate had then been made. The remedy of the debtor was by the application of the payments made in reduction of the principal of the final renewal note. For the reasons given, the judgment is reversed, with directions to dismiss the petition.

NOTE.—*Application of Payment Under Usury Laws.*—It is a well settled rule of law that if the debtor fails to make the appropriation the creditor may apply the money in payment of any demand he may choose even one not enforceable at law. Sanborn v. Stark, 31 Fed. Rep. 18; Armstead v. Brooke, 18 Ark. 521; Bancroft v. Dumas, 21 Vt. 456; Livermore v. Rand, 26 N. H. 85; Treadwell v. Moore, 34 Me. 112. One important exception well sustained by authority is laid down in the principal case that the creditor cannot apply a payment to a demand absolutely unlawful, as a claim for usurious interest. Prickett v. Bank, 32 Ark. 346; Phillips v. Moses, 65 Me. 70; McCausland v. Ralston, 12 Nev. 195, 28 Am. Rep. 781; Fowler v. Trust Co., 12 S. Ct. 1, 141 U. S. 384, 408. So even in so ne cases, where the debtor makes direct payment of the usurious interest, the application will be diverted to the principal. Thus in the case of Missouri, etc. Insurance Co. v. Kittle, 2 Fed. Rep. 113, it was held that under an agreement whereby a party, in order to secure a loan of money, contracts to pay 12 per cent. per annum interest, the maximum rate allowed by law, and also, as a part of the same transaction and in consideration of such loan, agrees to take from the party loaning the money an insurance policy and pay the premium thereon, the payments made in such case, under the name of premiums, must be regarded as paid on the loan; the insurance contract, made as it was to cover usury, being void. See also Turner v. Turner, 80 Va. 379, where the court says: "There is a well recognized exception to the rule that the creditor may apply where the debtor does not, that the creditor has no right to apply the money paid to him to the satisfaction of what does not, nor ever did, constitute any legal or equitable demand against the party making the payment." The following are the latest authorities on this point and show the tendency of the decision on this question under a variety of circumstances. Thus interest in excess of the legal rate should be credited on the principal as of the time of payment. Day's Admx. v. Davis (Ky. 1898), 47 S. W. Rep. 769. Since so much of a note as provides for usurious interest is void, the maker is not confined to this statutory remedy for the recovery of double interest paid, but is entitled to have it applied in extinguishment of the principal debt. People's Building Loan & Savings Assn. v. Bessonette (Tex. 1898), 48 S. W. Rep. 52. Where a mortgage, to secure a loan made by a broker as the agent of the lender, was allowed to be used to secure usurious compensation to the broker, who subsequently became the owner of the mortgage, the payments illegally received must be applied on the principal of the mortgage debt. Hughson v. Loan Co. (N. J. 1898), 41 Atl. Rep. 492. In Atlanta Savings Bank v. Spencer (Ga. 1899), 33 S. E Rep. 878, payments made on a usurious debt, when not otherwise directed by the debtor, will be first applied to the payment of the legal interest due at the date of the payment, and any balance remaining after such interest is discharged will go in reduction of the principal. In a suit on a note given to obtain a credit actually indorsed on a note which included usurious interest, the credit was deemed to be on the principal rather than in extinguishment of the usurious interest, so as not to render the note sued on invalid. Tomblin v. Higgins, 78 N.W. Rep. 620, reversing same case (on rehearing) 53 Neb. 92. Where a note drawing lawful interest is extended in consideration of payments of usurious interest, the portion of such payments in excess of the interest, due at the stipulated rate should be credited on the principal, and the amount remaining due draw interest at such rate. Quinlan's Estate v. Smye (Tex. 1899), 50 S. W. Rep. 1068. The law applies partial payments upon a promissory note infected with usury first to the extinguishment of the lawful interest, and then to the reduction of the principal; and a plea setting up such payment is good, though filed more than twelve months after the making of the same. Haskin v. Bank, 100 Ga. 216, 27 S. E. Rep. 985. In Faulkner v. Bank (Ky. 1897), 43 S. W. Rep. 249, the law as to application of payments was construed in reference to statutes of the United States. In that case it was held that under Rev. St. U. S. § 5198, providing for the forfeiture of the interest where usury is taken by a national bank, and giving to the person by whom it is paid the right to recover twice the amount of interest paid, a surety, when sued on the last of several renewals of a note, is not entitled to credit by the usurious interest paid by the principal at the time of the several renewals, but only by the amount withheld by the bank when the original note was executed, where the right of the principal to recover the penalty is barred by a judgment dismissing, as settled, an action brought by him to recover the penalty. See also as to application of payments in cases of usury: Arnold v. Macdonald, 22 Tex. Civ. App. 487 55 S. W. Rep. 529; Nunn v. Bird (Oreg. 1900), 59 Pac. Rep. 808; Flannery v. Bank (Ky 1899), 52 S. W. Rep. 847; Fretz v. Murray, 76 N. W. Rep. 495.

National Banks—Usurious Transactions.—The "usurious transaction" from which limitations run against an action to recover twice the amount of usurious interest paid to a national bank (Rev. St. U. S. § 5198) occurs only when an amount greater than the principal and legal interest has been paid, or judgment recovered for such an amount, as the creditor can until that time purge the usury by crediting the excessive interest on the principal. First National Bank v. Denson (Ala. 1897), 22 South.

Rep. 518. In the case of Marion National Bank v. Thompson (Ky. 1897), it was held that under Rev. St. U. S. § 5198, the penalty for reserving usurious interest by the contract is the forfeiture of the entire interest, while the penalty where the interest has been actually paid is the liability in a separate action for twice the amount thus paid. It was also held in this case that the penalty prescribed for actually receiving usurious interest can be recovered only in a separate action brought for that purpose, and cannot be set off against the principal. Jurisdiction of actions under U. S. Stat. § 5198 against national banks for taking greater interest than allowed by the laws of the state in which the bank is located, is vested in state as well as federal courts. Endres v. Bank (Minn. 1896), 68 N. W. Rep. 1092. In the case of Colgin v. Bank (Tex. 1897), 40 S. W. Rep. 634, it was held that Rev. St. U. S. § 5198, providing that the taking by a national bank of a greater rate of interest than that allowed by law shall work a forfeiture of all the interest, and one paying such greater rate may recover back "twice the amount of the interest thus paid," authorizes a recovery of twice the amount actually paid and not twice the difference between the legal rate and that actually paid. See also as to measure of damages in such cases, Boerner v. Bank (Tex. 1897), 39 S. W. Rep. 285.

BOOK REVIEWS.

AMERICAN STATE REPORTS.

The 80th volume of that most excellent series of annotated reports, known as the American State Reports, has just come from the press. Having examined it critically we observe no backward features. In every respect it upholds the reputation which this series has so justly earned. Among the many valuable monographic notes, we call attention to the following: "Powers Which May Be Delegated to Boards of Health;" "Negligence of Attorney as Ground for Relief from Judgment;" "Collateral Attack Upon Forged or Altered Judgment Entries;" "Purchase by Agent of Property of Principal;" "Liability of Banks for not Honoring Checks." Printed in one volume of 1,053 pages, and published by the Bancroft-Whitney Company, San Francisco, Cal.

BOOKS RECEIVED.

The American Digest Annotated, Continuing without Omission or Duplication the Century Edition of the American Digest, 1658 to 1896. 1901A. A Digest of all Current Decisions of all the American Courts, as Reported in the National Reporter System, the Official Reports, and Elsewhere, Together with Leading English and Canadian Cases, from October, 1, 1900, to March 31, 1901. Prepared and Edited by the Editorial Staff of the American Digest System. St. Paul, Minn. West Publishing Co., 1901. Review will follow.

HUMORS OF THE LAW.

An attorney, on the marriage of his son, gave him £500, and handed him over a chancery suit, with some common-law actions. About two years afterwards the son asked his father for more business. "Why, I gave you that capital chancery suit," replied the father, "and then you have got a great many new clients; what more can you want?" "Yes, sir," replied the son, "but I have wound up the chancery suit, and given my client great satisfaction, and he is in possession of the estate." "What, you improvident fool," rejoined the father indignantly, "that suit was in my family for twenty five years, and would have continued so as much longer if I had kept it. I shall not encourage such a fellow."

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts

1. ABATEMENT AND REVIVAL—Suits in State and Federal Courts.—The pendency of a suit in a state court is not a bar to a suit in a federal court between the same parties, and involving the same subject matter.—Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co., U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 504.

2. ACKNOWLEDGMENT — Omission of Venue. — A notary's certificate of acknowledgment, without any venue, held insufficient.—*In re* Henschel, U. S. D. C., S. D. (N. Y.), 109 Fed. Rep. 861.

3. ALIENS—Deportation.—Wife and child of naturalized citizen, who are likely to become public charges, held properly deported, where marriage, though valid in the country where solemnized, is illegal in the United States.—United States v. Rodgers, U. S. D. C., E. D. (Pa.), 109 Fed. Rep. 886.

4. ALIENS—Importing Foreign Labor.—A private person cannot maintain an action to recover for his own benefit the penalty imposed by Act Feb. 26, 1885, for importing a foreign laborer under contract.—Rosenberg v. Union Iron Works, U. S. D. C., N. D. (Cal.), 109 Fed. Rep. 844.

5. APPEAL—Exceptions.—Where, on refusal of leave to discontinue at the close of the testimony, plaintiff takes no exception to the ruling, it cannot be reviewed on appeal.—Transcendent Light Co. v. Steitz, N. Y., 71 N. Y. Supp. 947.

6. APPEAL AND ERROR—Assignments of Error.—Assignments of error as to rulings of the court, with nothing to show that the court so held and adjudged, will not be considered.—Albany Perforated Wrapping-Paper Co. v. John Hoberg Co., U. S. C. C. of App., Seventh Circuit, 109 Fed. Rep. 589.

7. APPEAL AND ERROR—Motion to Dismiss.—On motion to dismiss an appeal from an order denying a new trial, that the motion for such new trial was not served on necessary parties will not be considered.—Gardner v. Stare, Cal., 66 Pac. Rep. 3.

8. APPEAL AND ERROR—Questions of Fact.—The circuit court of appeals cannot review the finding of a jury on a question of fact, where there is evidence in the record to support it.—Southern Pac. Co. v. Covey, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 416.

9. APPEAL AND ERROR—Writs of Error.—A writ of error is applicable alone to suits at law and an appeal

to decrees in equity or admiralty, and the one may not be substituted for the other.—Loveless v. Ransom, U. S. C. C. of App., Seventh Circuit, 109 Fed. Rep. 891.

10. ATTACHMENT—Attachment Bond.—On application for increase of bond in attachment, the question to be determined is whether the action must be tried in order to obtain dissolution of attachment.—Ives v. Ellis, N. Y., 71 N. Y. Supp. 971.

11. ATTACHMENT — Attorney's Fees. — Under the Florida statutes and decisions, reasonable attorney's fees incurred by a defendant in obtaining the dissolution of an attachment are recoverable as an element of damages in an action on the attachment bond.—L. Buck & Son Lumber Co. v. Fidelity & Deposit Co. of Maryland, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 893.

12. ATTORNEY AND CLIENT—Fees.—Attorney held not entitled to recover more than the amount fixed by a contract for fees.—Reynolds v. Sorosis Fruit Co., Cal., 66 Pac. Rep. 21.

13. BANKRUPTCY—Adjustment of Liens.—A court of bankruptcy will not undertake to determine or adjust liens upon property of the bankrupt, unless it appears that the trustee has at least a probable interest in it for the creditors.—*In re* Gibbs, U. S. D. C., D. (Vt.), 109 Fed. Rep. 627.

14. BANKRUPTCY—Alimony.—Discharge of bankrupt held not to affect his liability to pay alimony.—Young v. Young, N. Y., 71 N. Y. Supp. 944.

15 BANKRUPTCY—Breach of Promise Judgment.—Judgment for breach of marriage promise held not canceled by a discharge in bankruptcy.—Disler v. McCauley, N. Y., 71 N. Y. Supp. 949.

16. BANKRUPTCY—Breach of Promise Judgment.—A claim for breach of promise of marriage, reduced to judgment before a bankrupt's discharge, may be proved against his estate in bankruptcy.—*In re* Fife, U. S. D. C., W. D (Pa.), 109 Fed. Rep. 880.

17. BANKRUPTCY—Compensation of Trustee.—A court of bankruptcy is without authority to allow compensation to a trustee in excess of that fixed by Bankr. Act 1898, § 48a.—*In re* Epstein, U. S. D. C., W. D. (Ark.), 109 Fed. Rep. 878.

18. BANKRUPTCY—Conditional Sales to Bankrupt—Title in Trustee.—Conditional sales of merchandise by which the seller retained title, the trustee became subrogated to the rights of the creditors as to such property, and took title thereto free from the claim of the seller under his contract.—*In re* Howland, U. S. D. C., N. D. (N. Y.), 109 Fed. Rep. 869.

19. BANKRUPTCY—Corporations — Voluntary Bankruptcy. — A coal mining corporation cannot be adjudged an involuntary bankrupt.—*In re* Keystone Coal Co., U. S. D. C., W. D. (Pa.), 109 Fed. Rep. 872.

20. BANKRUPTCY—Discharge—False Bookkeeping.—The fraud of one partner in so keeping firm books as to conceal withdrawals of money by himself from his co partner, cannot be imputed to the innocent partner to defeat his right to a discharge.—*In re* Schultz, U. S. D. C., S. D. (N. Y.), 109 Fed. Rep. 264.

21. BANKRUPTCY—Discharge—False Oath.—A voluntary bankrupt held not entitled to a discharge, where he made a false oath to his schedule.—*In re* Gammon, U. S. D. C., N. D. (Iowa), 109 Fed. Rep. 812.

22. BANKRUPTCY—Discharge—Fraud in Schedule.—The failure of a bankrupt to include in his schedule property held by another on a secret trust for his benefit will defeat his right to a discharge.—*In re* Wilcox, U. S. C. C. of App., Second Circuit, 109 Fed. Rep. 628.

23. BANKRUPTCY—Fictitious Name of Bankrupt—Exemptions.—The fact that a bankrupt conducted business under fictitious name, does not affect his right to exemptions under the state laws.—*In re* Carpenter, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 558.

24. BANKRUPTCY—Garnishment Within Four Months.—Under Bankr. Act 1898, § 67f, a debtor of the bankrupt, garnished within four months in a state court, may be permitted to pay the money into the district court and obtain such order for his protection as may be necessary.—*In re* McCartney, U. S. D. C., E. D. (Wis.), 109 Fed. Rep. 621.

25. BANKRUPTCY—Inaccurate Bookkeeping.—That bankrupt's books were not kept with reference to showing his financial condition held no bar to his discharge.—*In re* Lafleche, U. S. D. C., D. (Vt.), 109 Fed. Rep. 807.

26. BANKRUPTCY—Interlocutory Orders.—An interlocutory order entered by a court of bankruptcy, reversing a ruling of the referee, made during the examination of the bankrupt, refusing to require him to produce his books, is not appealable.—Goodman v. Brenner, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep 481.

27. BANKRUPTCY—Judgment for Criminal Conversation.—A judgment for criminal conversation held not vacated by discharge in bankruptcy.—Colwell v. Tinker, N. Y., 71 N. Y. Supp. 952.

28. BANKRUPTCY—Margins as Probable Claim.—One who put up margins to a broker on purchases of marketable commodities for future delivery cannot prove his claim therefor against the estate of the broker in bankruptcy, where there is no evidence to show the result of the transactions or that any returns were received by the bankrupt therefrom.—*In re* Knott, U. S. D. C., D. (Vt.), 109 Fed. Rep. 626.

29. BANKRUPTCY—Reference—Mortgage to Firm.—Mortgage given by a firm held not affected by bankruptcy proceedings against one partner alone.—*In re* Sanderlin, U. S. D. C., E. D. (N. Car.), 109 Fed. Rep. 857.

30. BANKRUPTCY—Place of Business.—The principal place of business of a corporation engaged principally in manufacturing, to determine the district in which it may be adjudged bankrupt, is the place where its manufacturing plant is located.—*In re* Elmira Steel Co., U. S. D. C., N. D. (N. Y.), 109 Fed. Rep. 456.

31. BANKRUPTCY — Preference — Return.— Where a creditor of a bankrupt has received a payment from the estate after the date when all the parties owing the same were insolvent, he must repay the amount if he wishes to further share in the proceeds of the bankrupt estate.—*In re* Keller, U. S. D. C., N. D. (Iowa) 109 Fed. Rep. 306.

32. BANKRUPTCY—Preferences—Securities Taken as Collateral.—Mortgages taken by bank from insolvent merchant to secure money then loaned held not avoided by the bankruptcy of the borrower within four months thereafter.—*In re* Davidson, U. S. D. C., S. D. (Iowa), 109 Fed. Rep 882.

33. BANKRUPTCY—Priority of Jurisdiction.—As between courts in different districts, in each of which a petition in involuntary bankruptcy has been filed against a corporation, and either of which would have jurisdiction, priority of jurisdiction is determined by the date of the filing of the petitions, and not by the date of adjudication.—*In re* Elmira Steel Co., U. S. D. C., N. D. (N. Y.), 109 Fed. Rep. 456.

34. BANKRUPTCY—Sufficient Residence.—A bankrupt, who was never in North Carolina, except to board there a short time, is not a resident of that state or entitled to the exemption provided by its constitution.—*In re* Dinglehoef, U. S. D. C., E. D. (N. Car.), 109 Fed. Rep. 865.

35 BANKS AND BANKING—National Banks.—A national bank may make a binding oral agreement to pay notes it procures to be discounted.—Hanover Nat. Bank v. First Nat. Bank, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 421.

36. BENEFIT SOCIETIES—Insurance Laws.—The beneficiary fund of the Grand Lodge Ancient Order of

United Workmen is not controlled by the insurance laws of the state.—Marshall v. Grand Lodge A. O. U. W. of California, Cal., 66 Pac. Rep. 25.

37. BENEFIT SOCIETIES—Membership—Eligibility.—Director in a brewing company held not ineligible to membership in a fraternal association.—People v. Supreme Tent of the Maccabees of the World, N. Y., 71 N. Y. Supp. 960.

38. BENEFIT SOCIETIES—Suspension.—The non-payment of assessments in a beneficial society will operate to suspend a member from participation in the beneficiary fund where the laws of the order so provide.—Marshall v. Grand Lodge A. O. U. W. of California, Cal., 66 Pac. Rep. 25.

39. BILLS AND NOTES—Bona Fide Purchaser.—*Bona fide* purchaser of negotiable paper held not bound by facts which might put a very cautious man on inquiry.—Ketcham v. Govin, N. Y., 71 N. Y. Supp. 991.

40. BROKERS—Commission.—Real-estate agent finding responsible purchaser accepted by principal, held entitled to his commission.—Miller v. Barth, N. Y., 71 N. Y. Supp. 989.

41. CARRIERS—Prorating Supply of Cars.—It is the duty of a railroad company, when supply of coal cars is short, to prorate the supply on hand, without unjust discrimination.—United States v. Norfolk & W. Ry. Co., U. S. C. C., D. (W. Va.), 109 Fed. Rep. 881.

42. CHATTEL MORTGAGES—Recording.—Under the Ohio statute the withholding of a chattel mortgage from record does not estop the mortgagee from enforcing the same after it has been filed—*In re* Schmitt, U. S. D. C., N. D. (Ohio), 109 Fed. Rep. 267.

43. COLLISON—Negligent Speed.—Evidence held insufficient to sustain libel that the sinking of a canal boat at a dock by the force of the swell from a passing steamer was due to the negligent speed of the latter.—The New York, U. S. D. C., N. D. (N. Y.), 109 Fed. Rep. 909.

44. COLLISION—Rate of Demurrage.—In a suit for collision, where the injured vessel was delayed for repairs, the provision of her charter fixing the rate of demurrage is competent evidence of her actual damages by reason of such delay, and although it may not be conclusive, makes out a *prima facie* case in the absence of other proof.—The Columbia, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 660.

45. COLLISION—Tug and Tow—Warning of Danger.—A ship in tow cannot hold the tug responsible for her own failure to follow the tug's course, nor because it failed to warn her when she sheered, where the danger was as apparent to one as to the other.—The Columbia, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 660.

46. CONSTITUTIONAL LAW—Local Statutes.—The act of the legislature of March 22, 1901, entitled "An act to establish an excise department in cities of the first class," is not unconstitutional as a private, local or special law.—McArdle v. City of Jersey City, N. J., 49 Atl. Rep. 1013.

47. CONTEMPT—Alimony—Refusal to Pay.—It is no defense, on a motion for contempt in refusing to pay alimony, that respondent has no money.—Young v. Young, N. Y., 71 N. Y. Supp. 944.

48. CONTRACTS—Construction.—The situation of the parties to a contract when it is made, and its subject-matter and purpose, are material to determine the intention of the parties and the meaning of the terms they used, and when these are ascertained they must prevail over the dry words of the stipulations.—Fox v. Tyler, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 259.

49. CONTRACTS—Illegal Consideration.—A contract whose consideration is not illegal may be enforced, though it may incidentally aid one in violating the law.—Hanover Nat. Bank v. First Nat. Bank, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 421.

50. CONTRACTS—Rescission.—A party cannot rescind a contract unless he restores what he had received under it.—Brady v. Edwards, N. Y., 71 N. Y. Supp. 972.

51. CORPORATIONS—Charter—Construction.—Charter of corporation organized to publish a journal connected with the interest of the jewelry trade held authorized to publish a directory of such trade.—Jewelers' Circular Pub. Co. v. Jacobs, U. S. C. C., D (N. J.), 109 Fed. Rep. 509.

52. CORPORATIONS—Director's Contract—Voidable.—In order to avoid a contract which is merely voidable, made by a director with his corporation, some injury must be shown.—Copsey v. Sacramento Bank, Cal., 66 Pac. Rep. 7.

53. CORPORATIONS—Pleading.—In an action against the directors of an incorporated ball club to recover a debt of the corporation, plaintiff need not allege that defendant is not a political corporation.—Acker, Merrall & Condit v. Richards, N. Y., 71 N. Y. Supp. 929.

54. COSTS—Poor Person—Recover in Suit.—A plaintiff who brings an action *in forma pauperis* under the statute and recovers, but without costs, is not entitled to withdraw the money paid in satisfaction of the judgment from the registry of the court until he pays the clerk's fees properly taxed against him.—Davis v. Adams, U. S. D. C., N. D. (Cal.), 109 Fed Rep. 271.

55. COSTS — Two Defendants — Recovery. — Where plaintiff fails to recover against one of two defendants, he cannot recover costs against both.—Benson v. Braun, Cal., 66 Pac. Rep. 1.

56. COSTS—Verdict of Jury—Separate Proceeding.—The return and verdict of the jury in a criminal case is a separate proceeding which the clerk is entitled to record and to charge for as such.—Marsh v. United States, U. S. D. C., N. D. (Fla.), 109 Fed. Rep. 286.

57. COURTS—Decisions—Reasons.—On rendering decision in equity for plaintiff, the court is not compelled to state reasons why defenses in the answer were not sustained, nor write an opinion.—Brady v. Edwards, N. Y., 71 N. Y. Supp., 972.

58. DAMAGES—Lowering Water.—Measure of damages for injury to land by lowering water level by pumping system of city held the difference in value with and without such water.—Reifert v. City of New York, N. Y., 71 N. Y. Supp. 965.

59. DEATH Presumption.—Evidence held to create presumption of death after the lapse of seven years.—Morrow v. McMahon, N. Y., 71 N. Y. Supp. 961.

60. DEATH—Right of Action Under Foreign Statute.—A cause of action founded on a statute of one state, conferring a right of action to recover damages for wrongful death, may be enforced in a court of the United States, sitting in another state, when it is not inconsistent with the statutes or public policy of the state in which the action is brought.—Burrell v. Fleming, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 489.

61. DEEDS—School Purposes—Abandonment.—Where land is conveyed for school purposes only, on the abandonment of the land for such use all rights thereto revert to the grantor.—Papst v. Hamilton, Cal., 66 Pac. Rep. 10.

62. DISCOVERY—Producing Books.—Direction to defendant to produce books in order that plaintiff may prepare his complaint held erroneous.—Clark v. Ennis, N. Y., 71 N. Y. Supp. 948.

63. DISCOVERY — Producing Document — Order of Court.—A defendant cannot be held in default for a failure to produce documents until after the court has made an order for such production on due notice, which has been disobeyed.—Owyhee Land & Irrigation Co. v. Tautphaus, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 547.

64. DIVORCE—Vacating Judgment.—Motion to vacate judgment in divorce after death of plaintiff held too late.—Groh v. Groh, N. Y., 71 N. Y. Supp. 985.

65. EASEMENTS—Prescription.—To maintain an easement by prescription to pass over the lot of another,

the user must be by claim of right, of which the owner has notice.—Clarke v. Clarke, Cal., 66 Pac. Rep. 10.

66. ELECTIONS—Officers.—The members of the excise board by the act of the legislature are officers.—McArdle v. City of Jersey City, N. J., 49 Atl. Rep. 1013.

67. EMINENT DOMAIN—Condemnation Ordinance.—The passage of a condemnation ordinance by a city, declaring its election to take certain land for public use under the eminent domain statutes of the state, amounts to a present appropriation of such land, and entitles the owner to institute proceedings to recover compensation therefor.—*In re* Delafield, U. S. C. C., W. D. (Pa.), 109 Fed. Rep. 577.

68. EMINENT DOMAIN — Damages — Assessment.—In condemnation proceedings, assessment of fee damages must be of the date of the award.—Manhattan Ry. Co. v. Comstock, N. Y., 71 N. Y. Supp. 941.

69. EQUITY—Bill of Review.—A federal court of equity cannot entertain a petition in the nature of a bill of review, not filed until after the time has expired for taking an appeal from the decree sought to be reviewed.—Halstead v. Forest Hill Co., U. S. C. C., D. (W. Va.), 109 Fed. Rep. 820.

70. EQUITY—Master's Findings—Presumptions.—Findings of fact by a master are supported by a strong presumption of correctness, and will not be set aside or modified, in the absence of clear evidence of mistake or error.—Columbus, S. & H. R. Co. Appeals, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 177.

71. EQUITY—Opening Decree.—A motion to open a decree must not only be filed, but entertained or brought to the attention of the court, as shown by its records, during the term at which the decree was entered; otherwise, the court has no power to grant it at a subsequent term.—Graham v. Swayne, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 866.

72. EQUITY—Service of Process.—A bill will not be dismissed for lack of a party, who was made a defendant but has not been served, until complainant has had a reasonable time to obtain service; and he will be allowed longer than six months where such defendant resides in another state.—Blanchard v. Bigelow, U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 275.

73. ESTOPPEL—Acquiescence.—Acquiescence of riparian owner to pollution of stream by a sewer held not to estop him from objecting to an increase of such use.—Gale v. City of Syracuse, N. Y., 71 N. Y. Supp. 986.

74. ESTOPPEL—In Pais—Silence.—An estoppel *in pais* does not arise from the conduct of silence of one party to a transaction, where the other party was not misled and suffered no injury therefrom.—Columbus, S. & H. R. Co. Appeals, Sixth Circuit, 109 Fed. Rep. 177.

75. EVIDENCE—Municipal Documents.—Where documents connected with street assessments are introduced in evidence, the burden is on defendant to show invalidity or irregularity.—San Francisco Pav. Co. v. Bates, Cal., 66 Pac. Rep. 2.

76. EVIDENCE—Private Memorandum Book.—Entries in deceased's private memorandum book of moneys paid to plaintiff are not admissible against him.—Thompson v. Ruiz, Cal., 66 Pac. Rep. 24.

77. EVIDENCE—Written Contract—Parol Identification.—Where a contract is to furnish peaches from sundry orchards, parol evidence is admissible to identify the orchards referred to.—Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit-Packing Co., Cal., 66 Pac. Rep. 28.

78. EXECUTION—Executrix.—Executrix of deceased partner may join in application to issue execution on judgment in favor of the firm.—*In re* Armstrong, N. Y., 71 N. Y. Supp. 951.

79. EXECUTORS AND ADMINISTRATORS—Absent Heirs—Appointment of Attorney.—The court cannot appoint an attorney to represent absent heirs in the settlement of an estate, except where such heirs have failed to employ their own attorney.—*In re* Lux's Estate, Cal., 66 Pac. Rep. 30.

80. EXECUTORS AND ADMINISTRATORS—Partial Distribution.—An administrator has no authority to petition for a partial distribution of the estate, and a decree on his petition is void.—Alcorn v. Buschke, Cal., 66 Pac. Rep. 15.

81. EXECUTORS AND ADMINISTRATORS—Services Rendered Deceased.—Where a claim against an estate is for services rendered to deceased, to be paid when she sold certain land, which she had not sold, the claim filed need not describe the land.—Thompson v. Ruiz, Cal., 66 Pac. Rep. 24.

82. FEDERAL COURTS—Circuit Court of Appeals—Decisions.—An orderly administration of the law requires that the circuit court should follow a decision of a circuit court of appeals of another circuit, in the absence of conflicting authority and when the question is presented on precisely the same state of facts.—Hale v. Hilliker, U. S. C. C., N. D. (N. Y.), 109 Fed. Rep. 278.

83. FEDERAL COURTS—Mandate by Court of Appeals. An order entered by a circuit court in compliance with a mandate from the circuit court of appeals cannot be taken to that court for review by a second appeal or writ of error.—White v. Bruce, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 355.

84. FEDERAL COURTS—Nonsuit—Laws of State.—The right of a plaintiff in a federal court to take a nonsuit is governed by the state statutes.—Drummond v. Louisville & N. R. Co., U. S. C. C., S. D. (Ill.), 109 Fed. Rep. 531.

85. FEDERAL JURISDICTION—Diverse Citizenship—Partnership.—A federal court is without jurisdiction of a suit brought by plaintiff as a member of a partnership and as assignee of his partner, unless it is shown by the bill that the citizenship of the assignor is such that the suit could have been brought in that court by the partnership.—Ban v. Columbia Southern Ry. Co., U. S. C. C., D. (Oreg.), 109 Fed. Rep. 499.

86. FEDERAL JURISDICTION—Estates of Deceased Persons.—A federal court is without jurisdiction of a suit, the purpose of which is to control, through a receivership, the management of an estate which is in process of administration in a probate court of the state.—Johnson v. Ford, U. S. C. C., D. (Oreg.), 109 Fed. Rep. 501.

87. FEDERAL JURISDICTION—Suit on Contractor's Bond.—An action on contractor's bond for government work held within the jurisdiction of the circuit court.—Mullin v. United States, U. S. C. C. of App., Second Circuit, 109 Fed. Rep. 817.

88. FISH—Oyster Beds.—Claimant of oyster bed by license held not entitled to enjoin possession of such bed by the legal owner, who took possession after abandonment of same by plaintiff.—Riddell v. Brown, Wash., 65 Pac. Rep. 758.

89. FORGERIES—Evidence.—Evidence held sufficient to show that certain alleged bills and receipts of payments on mortgages were forgeries.—Levy v. Rust, N. J., 49 Atl. Rep. 1017.

90. FRAUD — Incorrect Statements.—Statement of party to contract as to his legal rights in a play, if incorrect, held not actionable fraud.—Brady v. Edwards, N. Y., 71 N. Y. Supp. 972.

91. FRAUDS, STATUTE OF—Option on Real Estate.—Under the Idaho statute of frauds, a written contract giving an option to purchase real estate cannot be legally extended after its expiration by a verbal agreement.—Lawyer v. Post, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 512.

92. FRAUDULENT CONVEYANCES—Reservation of Title. —Reservation of title by seller until paid for is void as against creditors of the purchaser.—*In re* Howland, U. S. D. C., N. D. (N. Y.), 109 Fed. Rep 969.

93. GUARANTY—Firm Purchases—Dissolution.—Person guarantying purchases of firm held bound by such guaranty after dissolution of the firm, where vendors of goods and guarantor had no knowledge of such

dissolution.—*In re* Cinque, U. S. D. C., E. D. (N. Y.), 109 Fed. Rep. 455.

94. HIGHWAYS—Street Assessment—Front Foot Rule. —Street assessment law is not repugnant to Const. U. S., because expense is to be assessed in proportion to the frontage of the lots.—San Francisco Pav. Co. v. Bates, Cal., 66 Pac. Rep. 2.

95. HOSPITAL—Liability for Negligence.—A patient in a public hospital, chartered as a charitable corporation, although under private management, cannot recover from such corporation for injuries resulting from the negligence of a nurse employed in its hospital. — Powers v. Massachusetts Homeopathic Hospital, U. S. C. C. of App., First Circuit, 109 Fed. Rep. 294.

96. HUSBAND AND WIFE—Lands of Wife.—Under the laws of Vermont, lands of a wife held under a deed containing no limitation as to their use and farmed by her husband, are not the wife's separate property, and their products are assets of the husband's estate in bankruptcy.—*In re* Rooney, U. S. D. C., D. (Vt.), 109 Fed. Rep. 601.

97. INDICTMENT AND INFORMATION—Demurrer.—The truth of specific averments of fact made in criminal information cannot be put in issue and determined on demurrer, unless the evidence necessary to such determination appears from the record.—United States v. Morrison, U. S. D. C., S. D. (Iowa), 109 Fed. Rep. 891.

98. INJUNCTION—Interlocutory Appeal.—On an appeal from an interlocutory order granting a preliminary injunction, the court will not enter upon the merits of the suit, except to determine whether or not there was an abuse of legal discretion.—Murray v. Bender, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 585.

99. INJUNCTION—No Irreparable Injury.—A preliminary injunction will not be granted where its denial will involve no risk of irreparable injury to complainant.—Miller v. Mutual Reserve Fund Life Assn., U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 278.

100. INSANE PERSONS—Final Settlement of Guardian. —The administrator of the estate of a deceased incompetent may contest the final account of the guardian of such incompetent.—*In re* Averill's Estate, Cal., 66 Pac. Rep. 14.

101. INSANE PERSONS—Guardian—Loaning Money.—Where a guardian loans the money of his ward on the sole credit of the borrower, he must show that he acted in good faith and with due prudence.—*In re* Averill's Estate, Cal., 66 Pac. Rep. 14.

102. INSURANCE—Acceptance of Risk.—The action of a clerk in the office of an insurance company, in filling up a slip reporting a risk to be indorsed under a marine policy and checking the same for entry as a matter of routine, held not to be an acceptance of the risk by the company.—Deleware Ins. Co. of Philadelphia v. S. S. White Dental M'g. Co., U. S. C. C. of App., Third Circuit, 109 Fed. Rep. 334.

103. INSURANCE—Misrepresentations — Constitutionality of Statutory Regulation. —Statute providing that misrepresentation by an insured shall not invalidate his policy, unless made with actual intent to deceive, or unless the matter misrepresented increases the risk of loss, is not unconstitutional, as special legislation, because it exempts from its operation contracts for mutual insurance.—Fidelity & Casualty Co. of New York v. Freeman, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 847.

104. INTEREST—Coupons.—Interest is not recoverable on coupons attached to railroad bonds payable in New York, and which remain in the hands of the holder of the bonds and attached thereto.—Columbus S. & H. R. Co. Appeals, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 177.

105. JUDGMENT—Conclusiveness.—A judgment rendered in an action on coupons from municipal bonds, adjudging the bonds void, is conclusive against a subsequent purchaser of such bonds, unless it is shown that he bought before maturity and without notice of the judgment.—Corliss v. Pulaski County, U. S. C. C., N. D. (Cal.), 109 Fed. Rep. 842.

106 JUDGMENT—Dismissal—Adjudication on Merits. —A judgment dismissing an action on the sole ground that the court has no jurisdiction is not an adjudication on the merits, and is no bar to another action for the same cause.—Bunker Hill & Sullivan Mining & Concentrating Co. v. Shoshone Min. Co., U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 504.

107. LIBEL AND SLANDER—Charging Insanity.—A publication falsely charging that plaintiff was of unsound mind, who in consequence was removed from a position as professor in a scientific school, will support an action for libel.—Totten v. Sun Printing & Publishing Assn., U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 289.

108. LIBEL AND SLANDER—Retraction—Damages.—In action for libel against a New Jersey corporation, Laws N. J. 1898, ch. 204, limiting for recovering to actual damages where no demand for retraction has been made, held not harmful.—Foye v. Guardian Printing & Pub. Co., U. S. C. C., E. D. (N. Y.), 109 Fed. Rep. 368.

109. MARRIAGE—Uncle and Niece.—Marriage between uncle and niece, though valid in Russia, where celebrated, held invalid in Pennsylvania.—United States v. Rogers, U. S. D. C., E. D. (Pa.), 109 Fed. Rep. 886.

110. MASTER AND SERVANT—Assumption of Risk.—A minor held to have assumed the risk of injury from the use of a certain kind of tamping bar furnished by his employer, and which he used without objection, where, if such bar was more dangerous than others in use, he was fully qualified to understand and appreciate such fact.—King v. Morgan, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 446.

111. MASTER AND SERVANT—Assumption of Risk.—A servant cannot be required to assume the risk from a danger which arises from the failure of the master to perform the duty imposed on him by law to exercise ordinary care in supplying reasonable safe tools or appliances or a reasonably safe place to work.—Southern Pac. Co. v. Yeargin, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 436.

112. MASTER AND SERVANT—Fellow-Servant—Foreman.—A foreman, engaged in the actual work of directing the operations of a pile driver, is a fellow-servant with the other members of the pile driver gang, for whose negligence, resulting in injury to another workman, the master is not responsible; and it is immaterial that he is also general foreman of the work, with power to hire and discharge the other employees.—McDonald v. Buckley, U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 290.

113. MASTER AND SERVANT—Safe Place to Work.—The death of a servant held to have been due to the failure of the master to exercise due care to provide him with a reasonable safe place in which to work.—Beattie v. Edge Moor Bridge Works, U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 233.

114. MECHANICS' LIENS—Priority of Mortgage.—The mechanic's lien statute of Arkansas construed as to priority of a mortgage given for money to be used in the construction of a building over mechanics' liens filed against the property for labor and materials furnished for such building.—*In re* Matthews, U. S. D. C., W. D. (Ark.), 109 Fed. Rep. 603.

115. MINES—Minerals—Discovery of Gold on Public Land.—Where plaintiff found gold while working for defendants in excavating a mill site on public land, defendants have no claims to the gold under Civil Code, § 1985.—Burns v. Clark, Cal., 66 Pac. Rep. 12.

116. MINES AND MINERALS—Patent—Presumptions.—A patent for a mining claim is conclusive that the location upon which it was issued was prior to every other location.—Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & De-

veloping Co., U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 538.

117. MORTGAGES—Bona Fide Purchaser.—A mortgage securing negotiable notes, although its delivery was procured by fraud, and the acknowledgment filled out and certified by a notary when it was never in fact acknowledged, is enforceable in the hands of a *bona fide* purchaser of the notes for value and before maturity.—O'Rourke v. Wahl, U. S. C. C. of App., Seventh Circuit, 109 Fed. Rep. 276.

118. MORTGAGES — Foreclosure — Renewal Notes.—Where a note for one year provides for renewal from year to year at the option of the holder, it may be declared due, and the security foreclosed, at the beginning of any year after the first.—Sacramento Bank v. Copsey, Cal., 66 Pac. Rep. 8.

119. MORTGAGES—Interest.—In determining amount due on modification of decree in foreclosure after appeal, held error to charge interest on total amount of debt, without crediting proceeds on foreclosure.—Taylor v. Ellenberger, Cal., 656 Pac. Rep. 4.

120. MORTGAGES—Purchase by Trustee.—A sale of property by trustees in a trust deed to a bank, of which such trustees were stockholders and directors, is not a sale to themselves; the bank being essentially an entity acting for itself.—Copsey v. Sacramento Bank, Cal., 66 Pac. Rep. 7.

121. MORTGAGES—Redemption—Tender.—To redeem from mortgage foreclosure, unless mortgagee is a non resident or mortgage is fraudulent, plaintiff must allege a tender of payment, or show that defendant, by default, has prevented plaintiff from performing.—Munro v. Barton, Me., 49 Atl. Rep 1069.

122. MORTGAGES—Unpaid Balance.—When a note is secured by trust deed, on foreclosure, any unpaid balance may be recovered from the maker by action.—Sacramento Bank v. Copsey, Cal., 66 Pac. Rep. 8.

123. MUNICIPAL CORPORATIONS—Sale of Bonds Without Advertising.—A contract by the trustees of the sinking fund of Cincinnati for the sale to a banking company of refunding bonds of the city, without advertising or receiving bids therefor, is void.—Roberts & Co. v. Taft, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 825.

124. MUNICIPAL CORPORATIONS—Unreasonable Ordinance.—An ordinance limiting speed to six miles an hour held void.—United Traction Co. v. City of Watervliet, N. Y., 71 N. Y. Supp. 977.

125. NEGLIGENCE—Explosion of Soda Water.—Vendor of seltzer water siphon held not liable to purchaser injured by its explosion.—Glazer v. Seitz, N. Y., 71 N. Y. Supp. 942.

126. NEW TRIAL—Surprise.—In action against railroad company for injuries received at accident, verdict for plaintiff set aside because of surprise at evidence as to the serious nature of the injuries received.—Dixon v. Brooklyn Heights R. Co., N. Y., 71 N. Y. Supp. 969.

127. NEW TRIAL—Two Findings of Jury Conclusive.—After two findings by juries the same way on a question of fact, the verdict will not be disturbed because the weight of evidence seems to the court to be against such findings.—Clark v. Barney Dumping Co., U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 235.

128. PLEADING—Demurrer.—As against a demurrer, a pleading will be deemed to allege whatever can be implied from its statements by fair and reasonable intendments.—Acker, Merrall & Condit v. Richards, N. Y., 71 N. Y. Supp. 929.

129. PLEADING—Motion and Answer—Issues.—Where motion to set aside summons for insufficient service has been overruled, such issue cannot be again raised by answer.—Foye v. Guardian Printing & Publishing Co., U. S. C. C., E. D. (N. Y.), 109 Fed. Rep. 368.

130. POST OFFICE — Defrauding by Use of Mails.—An indictment for defrauding by use of mails held insufficient under Rev. St. § 5480, as amended by Act March 2, 1889, where it does not show or charge a scheme by which the person name would be defrauded.—Milby v. United States, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 638.

131. PRINCIPAL AND AGENT—Discretion of Agent.—In a power of attorney to sell land for such price as the agent may deem best, a provision that the sale must be subject to the approval of the principal is not repugnant.—Alcorn v. Buschke, Cal., 66 Pac. Rep. 15.

132. PUBLIC LANDS—Connecting Survey.—Where the United States plats and patents land by a lake on the theory that the land is bounded by the lake, it cannot thereafter correct its survey and revoke its grants as against innocent purchasers from its patentees.—Kirwan v. Murphy, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 354.

133. PUBLIC LANDS — Timber Rights.—Under Act March 3, 1875, giving a right to cut timber on adjacent public lands for use in the construction of a railroad over such lands, a railroad company is authorized to cut timber on lands adjacent to any part of its completed main line for use in the subsequent construction of a branch line authorized by its charter.—United States v. Price Trading Co., U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 239.

134. QUIETING TITLE — School Lands.—Where the grantee in a deed conveying land for school purposes only abandon the land, and the grantor enters, he may sue to cancel deed and quiet title.—Papst v. Hamilton, Cal., 66 Pac. Rep. 10.

135. RAILROADS — Bondholders — Reorganization. — Bondholders who joined in a reorganization agreement, under which a new company was organized which purchased the property of the old at a foreclosure sale, and who exchanged their bonds for those of the new company, held not entitled to a rescission of such agreement after the new company became insolvent.—Columbus, S. & H. R. Co. Appeals, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 177.

136. RAILROADS — Subcontractor's Liens.—Act Feb. 25, 1889 (Laws Oreg. 1889, p. 75), providing for lien upon railroads in favor of subcontractors and laborers, supersedes, and, by implication, repeals, the prior mechanic's lien law of the state as applied to railroads.—Ban v. Columbia Southern Ry. Co., U. S. C. C., D. (Oreg.), 109 Fed. Rep. 499.

137. RECEIVERS—Agreement to Redeem Mileage.—An agreement by a railroad receiver to pay the amount of mileage previously sold by the company over the road of another company which shall be redeemed by such company does not make the claim therefor a debt of the receivership.—Monsarrat v. Mercantile Trust Co. U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 280.

138. RECEIVERS—Certificates—Liens.—Receivers' certificates issued by authority of an order made in a railroad foreclosure suit held not to constitute a lien on the property after sale under the terms of the order and decree of sale.—Columbus, S. & H. R. Co. Appeals, U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 177.

139. RECEIVER — Suing Outside of Jurisdiction.—A Minnesota receiver appointed to collect from the stockholders of an insolvent corporation the amount of their statutory liability for the benefit of all the creditors, may maintain an action at law in a federal court in another state against a stockholder residing therein.—Hale v. Hilliker, U. S. C. C., N. D. (N. Y.) 109 Fed. Rep. 278.

140. REFORMATION OF INSTRUMENT — Parties.— Reformation of deed denied, suit not being between the parties to the deed.—Cole v. Fickett, Me., 49 Atl. Rep. 1066.

141. REPLEVIN—Attorney's Fees and Expenses.—In replevin by corporation, counsel fees and traveling expenses of president are not recoverable as damages.—Hampton & B. R. & Lumber Co. v. Sizer, N. Y. 71 N. Y. Supp. 990.

142. SALES—Breach of Warranty.—Defects.—An answer, pleading as a partial defense to an action for the price of machinery defects in the workmanship and material in violation of the contract of sale, held sufficient.—Florence Oil & Refining Co. v. Farrar, U. S. C. C. of App., Eighth Circuit, 109 Fed. Rep. 254.

143. SALES—Crop—Failure.—Where a contract for a specified crop cannot be filled because of failure of the crop without fault of the vendor, the vendee cannot recover damages for such failure.—Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit Packing Co., Cal., 66 Pac. Rep. 28.

144. SALES—Installments.—A contract for the sale of a large quantity of logs, to be delivered in installments each month during a period of eight years, and to be paid for in installments as delivered, construed, and held to be an entire contract for the sale of the full quantity required to be delivered thereunder. — L. Bucki & Son Lumber Co v. Atlantic Lumber Co., U. S. C. C. of App., Fifth Circuit, 109 Fed. Rep. 411.

145. SALVAGE—Measure.— Award of $200 salvage allowed for hauling ferryboat out of slip at the time of apparent danger from fire held proper.—The John F. Brady, U. S. D. C., E. D. (Pa.), 109 Fed. Rep. 912.

146. SCHOOLS AND SCHOOL DISTRICTS—Orphan Asylum—Salaries.—Board of education of city held authorized under constitution and statutes to pay salaries to teachers in a local orphan asylum.—Sargent v. Board of Education of City of Rochester, N. Y., 71 N. Y. Supp. 954.

147. SPECIFIC PERFORMANCE—Tender of Payment.—A purchaser of real estate, who is required to make payment by a day certain, time being of the essence of the contract, is bound to make or tender such payment within the time to entitle him to a specific performance.—Kentucky Distilleries & Warehouse Co. v. Warwick Co., U. S. C. C. of App., Sixth Circuit, 109 Fed. Rep. 280.

148. STATUTES—Construction.—In construing a statute, the intent of the legislature is always a proper matter to be considered.—*In re* Matthews, U. S. D. C., W. D. (Ark.), 109 Fed. Rep. 603.

149. TOWAGE—Degree of Skill.—The owner of a tug is not an insurer against marine perils, and is liable only for the want of reasonable diligence and skill in the towing service; nor is an error of judgment on the part of the master equivalent to negligence.—The E. Luckenback, U. S. D. C., S. D. (N. Y.), 109 Fed. Rep. 487.

150. TRADE-MARKS AND TRADE-NAMES — Color and Shape of Label.—While no one can have a trade-mark monopoly in color of paper or shape of label, in color of ink or in one or another detail, a general collocation of such details will be protected against an imitation, the natural result of which is to deceive purchasers, and which must therefore be presumed to have been adopted with that purpose.— Lalance & Grosjean Mfg. Co. v. National Enameling & Stamping Co., U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 317.

151. TRADE-MARKS AND TRADE-NAMES — "Omega" Oil.—Soap manufacturers enjoined from using the words "Omega Oil," belonging as a trade-mark to manufacturers of a liniment. — Omega Oil Co. v. Weschler, N. Y., 71 N. Y. Supp. 983.

152. TRADE-MARKS AND TRADE-NAMES. — Right of Retailer.—A purchaser of an article at wholesale has a right to retail the same under the name by which it is designated by the manufacturer, but not to designate it by a name used by the manufacturer, and which has become known to the public, as denoting a grade superior to that sold.—Russia Cement Co. v. Katzenstien, U. S. C. C., S. D. (N. Y.), 109 Fed. Rep. 314.

153. TRADE-MARKS AND TRADE-NAMES—Similarity.—Trade-mark "Grape-Nuts" held not infringed by the name "Grain-Hearts," under which a similar cereal food is sold.—Postum Cereal Co. v. American Health-Food Co., U. S. C. C., E. D. (Pa.), 109 Fed. Rep. 898.

154. TRIAL—Instructions.—Where each side submits a number of instructions, and those given on the whole are fair, the verdict should not be set aside, though some are subject to criticism.—*In re* Keithley's Estate, Cal., 66 Pac. Rep. 5.

155. TRUSTS—Legal and Equitable Titles.—Where a person, through mistake, obtains legal title to property belonging to another, it is impressed with a trust in favor of the equitable owner.—Cole v. Fickett, Me., 49 Atl. Rep. 1066.

156. TRUST—Separable Trusts.—Where land was conveyed to the daughter of the grantor in trust for her use during life, and on her death for the use of her children, the trust to her is valid and separable from the trust to the children.—Nellis v. Rickard, Cal., 66 Pac. Rep. 32.

157. TRUST—Trustee and Cestui Que Trust Identical.—A *cestui que trust* may be appointed the trustee without affecting the validity of the trust.—Nellis v. Rickard, Cal., 66 Pac. Rep. 32.

158. TRUSTS—Voluntary Trust.—Publisher of paper, receiving contributions for support of families of dead firemen in response to his solicitation, held to be a voluntary trustee of the funds.—Hallinan v. Hearst, Cal., 66 Pac. Rep. 17.

159. TRUSTS—Voluntary Trust.—Publisher of paper, receiving certain contributions for support of families of dead firemen, held to have the determination of the question of who composed such families.—Hallinan v. Hearst, Cal., 66 Pac. Rep. 17.

160. UNITED STATES—Claims—Attorney's Fees.—Administrator *de bonis non* of fund derived under French spoliation act should be reimbursed for expenses and attorney's fees incurred in a suit to determine the question of distribution.—Healey v. Cole, Me., 49 Atl. Rep. 1065.

161. UNITED STATES—French Spoliation Claims.—On appropriation of money by congress for payment of French spoliation claims, it had the right to make the gift on its own terms.—Healey v. Cole, Me., 49 Atl. Rep. 1065.

162. VENDOR AND PURCHASER — Worthless Mining Claim.—Where a mining claim is worthless, defendant, who has an option to purchase, is not damaged by plaintiff's inability to convey.—Benson v. Braun, Cal., 66 Pac. Rep. 1.

163. VENUE—Accessibility of Court.—In determining motion for change of place of trial for convenience of witnesses, the accessibility of the court to all the witnesses may be considered.—O'Beirne v. Miller, N. Y., 71 N. Y. Supp. 946.

164. WATER AND WATER COURSES—Melting Snow.—Owner of lot on side of hill held not liable to owner of lot lower down on the hill for melted ice and snow running down on such lower owner's lot.—Garrett v Wood, N. Y., 71 N. Y. Supp. 987.

165. WILLS—Charging Real Estate.—Will construed, and held, that deficiencies in money legacies were a charge on the real estate.—Wellbrook v. Otten, N. Y., 71 N. Y. Supp. 927.

166. WILLS—Evidence as to Sanity.—It is not error to permit an intimate acquaintance of a testator to state his opinion as to testator's sanity.—*In re* Keithley's Estate, Cal., 66 Pac. Rep. 5.

167. WITNESSES—Chinese—Truthfulness.— The fact, alone, that a trial court refuses to accept as true the testimony of Chinese witnesses is not ground for reversal.—Woey Ho v. United States, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 888.

168. WITNESSES — Evidence of Good Character.— A court may refuse to permit a party to introduce evidence of the general good character of his own witnesses, who are Chinese, where there has been no attempt to impeach their character.—Woey Ho v. United States, U. S. C. C. of App., Ninth Circuit, 109 Fed. Rep. 888.